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ABSTRACT

This instructor's guide assists secondary social studies educators in making effective use of the five-part video series, "That Delicate Balance II: Our Bill of Rights." In the tradition of "The Constitution: That Delicate Balance," the series introduces students to the Bill of Rights and the controversies that have arisen over these rights. Led by moderators using the Socratic method of inquiry, the series features panels of experts engaging in lively debate about the constitutional, ethical, and social issues arising from a number of hypothetical scenarios. The programs enrich secondary civics, government, and history courses that examine the Constitution, Bill of Rights, civil liberties, or contemporary issues. The instructor's guide opens with a summary of the topics of the five units in the series. The unit topics are Roe v. Wade; the First Amendment and hate speech; a rape trial; equality and the individual; and criminal justice, from murder to execution. A section on each unit provides teachers with an overview of the issue presented, background materials that teachers may copy and distribute to their class, and discussion questions based on these materials that students can debate prior to viewing the video. Each section likewise presents discussion questions for the class to debate following the video as well as suggestions for further research, reports, and essays. At the back of the guide, teachers are provided with a convenient list of teaching resources related to the Bill of Rights. (JD)

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Our Bill of Rights

SO 024 561

American Bar Association
Special Committee
on Youth Education
for Citizenship

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[illegible] Bandwagon or Our Rights?

INSTRUCTOR'S GUIDE

SPECIAL COMMITTEE ON
Youth Education for Citizenship
AMERICAN BAR ASSOCIATION

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To order a copy of this guide, contact the American Bar Association, YEFC, 541 N. Fairbanks Court, Chicago, IL 60611-3314; 312/988-5735.
$10.00

ABOUT THE SERIES

Introduction

Columbia University Seminars on Media and Society and the American Bar Association present *That Delicate Balance II: Our Bill of Rights*, a five-part series of hour-long programs on critical Bill of Rights issues confronting Americans.

Produced under the guidance of former CBS News president Fred Friendly, the series is in the tradition of *The Constitution: That Delicate Balance* and other Friendly-produced series. Led by moderators using the Socratic method of inquiry, the series features panels of experts engaging in lively debate about constitutional, ethical, and social issues arising from a number of hypothetical scenarios.

Participants

Program moderators include trial attorney/Court TV anchor John Ford and Harvard Law professors Arthur Miller, Charles Nesson, Charles Ogletree, and Kathleen Sullivan. The many eminent panelists include Yale Law School Professor Stephen Carter; former U.S. Appeals Court Judge Robert Bork; U.S. Supreme Court Justice Antonin Scalia; Yale University President Benno Schmidt; U.S. Solicitor General Kenneth Starr; New York Times columnists Anthony Lewis and Anna Quindlen; and ACLU President Nadine Strossen.

Availability

Off-satellite taping rights for the five-part series cost $125 for ALSS Associates (includes many universities, public institutions, and school districts) or $200 for nonmembers with access to satellite equipment capable of downlinking C-Band transmissions. For further information (including licensing), contact PBS Adult Learning Service at 800/257-2578.

That Delicate Balance II is also available from PBS Video (800/344-3337). The cost is $350/series or $79.95/program. You may also want to contact your local PBS affiliate to see when it will rebroadcast the series—or to encourage the station to do so. For educational use, broadcasts may be taped off-air without charge within PBS guidelines.

ABOUT THIS INSTRUCTOR'S GUIDE

This instructor's guide to *That Delicate Balance II: Our Bill of Rights* is designed to help secondary social studies educators make effective use of each of the five programs in their classrooms. It has been prepared by the American Bar Association Special Committee on Youth Education for Citizenship (ABA/YEFC).

These programs will enrich and extend units in secondary civics and government classes examining the Constitution, Bill of Rights, civil rights and civil liberties, individual rights, "justice and the law," or contemporary issues. Relevant Supreme Court cases cited in this instructor's guide emphasize recent judicial decisions. The programs are also appropriate for many areas of study in American and world history classes (see concept matrix on inside back cover).

To receive a copy of this guide, contact the American Bar Association, YEFC, 541 N. Fairbanks Court, Chicago IL 60611-3314; 312/988-5735. Support for the guide has been granted from the Bill of Rights Education Collaborative, a joint project of the American Historical Association and the American Political Science Association, with funding from The Pew Charitable Trusts.

Teaching notes are organized into the following sections:

- *Before Viewing the Program* offers teaching suggestions to use prior to using the program.
- *Overview of the Program* provides valuable background information, a summary of the program's content, and special terms. This section can be duplicated for classroom use.
- *While Viewing the Program* presents activities for student investigation of the topic and related concepts. These pages are also formatted to duplicate for classroom use.
- *After Viewing the Program* contains responses to questions and alternative teaching suggestions to develop the topic further.

ABOUT THE PROGRAM

Pages 5–12 1

LIFE AND CHOICE AFTER *ROE v. WADE*

Program Summary

Roe v. Wade, 410 U.S. 113 (1973), is the Supreme Court decision that established a fundamental constitutional right to abortion restricted only when there is a "compelling state interest." In this video program, moderator Charles R. Nesson of the Harvard Law School asks a panel of scholars, commentators, and pro- and anti-*Roe* activists to envision that *Roe v. Wade* has just been overturned by a "bare majority" of the Supreme Court. Individual states are now free to regulate abortions, including banning them outright. Nesson moves the panel through a sequence of changing scenarios during which they express their opinions regarding abortion's legal and political aspects.

The abortion issue has been one of the twentieth century's most agonizing conflicts. Classes viewing the program should remember that it deals with a question of law; therefore, the discussion focuses mainly on legal and political questions.

The program is divided into three segments, plus an introduction and conclusion by Fred Friendly.

Pages 13–20 2

THE FIRST AMENDMENT AND HATE SPEECH

Program Summary

The First Amendment and Hate Speech debates the appropriateness of regulating hate speech that demeans, offends, angers, or attacks an individual or group on the basis of race, ethnicity, gender, religion, or sexual orientation. Ethnic jokes, racial slurs, homophobic remarks, and displaying swastikas or burning crosses are all examples of hate speech.

Program moderator Arthur Miller of the Harvard Law School leads the discussion through a series of incidents ranging from campus speakers and racial supremacy meetings to insulting comments and cross burning, from speech that is most likely to be protected to speech that includes actions that may be regulated. As the distinguished panel debates important constitutional issues, spontaneous, unexpected answers often surface. Frequently, liberals end up on the same side as conservatives, and groups that the public generally sees as being on the same side of an issue split over the details. The complexity of the topic and the need to seek compromise are clearly evident. Viewers are able to observe firsthand the painstaking process by which political consensus is reached.

Pages 21–28 3

TWO ACCUSED: CHRONICLE OF A RAPE TRIAL

Program Summary

Rape is a criminal offense that occurs when a person engages in sexual intercourse with another person without that person's consent. In *Two Accused. Chronicle of a Rape Trial*, a college student named Jane Bright charges the governor's son, Joe Fame, with *date rape*, also known as *acquaintance* and *nonstranger* rape—a crime whose definition varies by state, but one in which the victim knows the attacker. Date rape is prohibited by state laws that make rape a crime. Since most rape victims know their attackers, date rape constitutes a significant number of rape cases and important legal and ethical questions that this program explores.

The jury will be asked to weigh Joe's word against Jane's. If both witnesses present credible testimony, how can the jury decide who is lying and who is telling the truth? Can the court prevent the jury from hearing and being influenced by media allegations regarding Jane's and Joe's prior sexual conduct? From hearing courtroom testimony about it? Should the court prevent these things? May it? Moderator Kathleen Sullivan of the Harvard Law School leads a distinguished panel as they confront the difficulty involved in balancing the rights of plaintiff and defendant in date rape cases.

ABOUT THE PROGRAM

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EQUALITY AND THE INDIVIDUAL

Program Summary

In *Equality and the Individual,* program participants struggle with the question of the extent to which the civil rights laws and constitutional provisions that were designed to end racial discrimination against minorities should limit modern race-conscious goals or quotas designed to benefit them. This debate over so-called "reverse discrimination" begins when moderator Charles Ogletree, Jr., of the Harvard Law School tells his panel of judges, journalists, academics, and school administrators that, in a town called Pacifica, five white police officers have apprehended the wrong man—an African American—and severely beaten him. The mayor's office is facing accusations not only of police brutality but of racial discrimination. African Americans, who represent 35 percent of the city's population, represent only 10 percent of its police force.

Though diverse and conflicting opinions emerge, it is apparent that panel members agree that America must move toward a society where a person is evaluated on individual abilities without regard to color, gender, religion, sex, or any other discriminatory factor. This program reveals, however, that we have yet to reach a consensus on the means through which to achieve this goal, and that resolving difficult issues like the ones involved here takes extraordinary skill and profound wisdom.

Pages 37–45 5

CRIMINAL JUSTICE: FROM MURDER TO EXECUTION

Program Summary

In *Criminal Justice: From Murder to Execution,* John Ford leads a distinguished panel through the developments in a hypothetical murder case—from the discovery that 7-year-old Becky Carson has been sexually assaulted and brutally murdered, to the ensuing investigation, arrest, trial, and sentencing of Frank, one of two suspected school custodians.

At each stage of the hypothetical, the panelists examine the inherent polarity between society's need, on the one hand, for protecting individuals against undue governmental intrusion and, on the other, for society's collective security through the government's diligent prosecution of criminals. At different times in our history, the courts have moved closer to one pole, then to the other. They have also adopted hybrid or compromise positions based on balancing the two interests.

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EDUCATIONAL RESOURCES

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ADDITIONAL RESOURCES

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KEY ORGANIZATIONS

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FURTHER INFORMATION

410 U.S. 113 (1973) ?!?

Legal citations, such as the one above, typically tell you where to find the full decision in cases. The first part tells you the volume number (e.g., 410); the second, the reporter series (U.S.); and the third, the page number on which the case begins (113). The number in parentheses is the year the case was decided (1973). Report volumes of Supreme Court cases include the United States Reports (U.S.) and the Supreme Court Reporter (S.Ct.). Pending Supreme Court cases are assigned docket numbers.

BEFORE VIEWING THE PROGRAM

Early Orientation

A few days before your class views the program, provide each student with a photocopy of pages 7–11. Have them read up to "While Viewing the Program" to become familiar with what *Roe* actually did and how it did so, and with the legal terms and other information needed to understand the issues discussed in the program and to work with these instructional materials. You may wish to have some students look up unfamiliar terms and post definitions for the class. Stress that, while reading these pages, the students will have the opportunity to practice analyzing perspectives unemotionally, so they should pay special attention to the process as explained in the first student challenge on page 10.

Appoint one student to schedule and lead a class discussion on the experience students had in analyzing perspectives they encountered while reading. Did they strongly resist any perspective? Did they strongly agree with any? Have the class leader ask for two or three student volunteers who will prepare to trace their thinking on one perspective through steps 1–4 in Student Challenge 1. As part of this early class discussion, these same students will help others unemotionally analyze any difficulties or impasses that occurred during their own reading or the class discussion itself.

Three Days Before

Answers to the questions in the following group activities can be developed out of materials on pages 7–10. Assign any of the questions to groups of two or more students, who will take different positions in answering. Appoint one student to lead the presentation of answers to the class two days before the tape is shown. Each group will express its opinions using the techniques of "thinking as argument" presented in the second student challenge on page 10. The student leader will invite classmates to share their opinions using the same process. Stress that, for both the group and classroom aspects of this activity, students who wish to contribute effectively must be very familiar with "thinking as argument."

Group 1:
What is the constitutional right of privacy on which the Court's decision in *Roe* was based? Where in the Bill of Rights and the Fourteenth Amendment is it stated? Is it explicitly mentioned or implied? What does it protect besides abortion? Why is it controversial? Which side of the controversy reflects your opinion regarding a constitutional right of privacy?

Group 2:
If the Court had decided *Roe* differently in 1973, do you think that the traditional route of political debate and legislative give-and-take would have been likely to create an evolving national consensus on the abortion question? What factors might have fostered such a consensus? Which might have prevented compromise through political and legislative channels? For example, would conflicting and deeply held moral convictions about when human life begins have been likely to prevent us from ever reaching a workable compromise outside judicial intervention? Identify what these convictions might be.

Group 3:
How might pro-choice forces have been able to work through the state legislatures—or perhaps even Congress—to change abortion laws? What means of doing so would have been at their disposal? How might pro-life forces have countered them?

Group 4:
If *Roe* was overruled, Justice Stewart's philosophy of "judicial restraint" or "strict interpretation" in deciding the meaning of the Bill of Rights would be ascendant on (would dominate) the Supreme Court. How might this affect the balance of power among the Court, the Congress, and the president? Between the federal and state governments? Would there be any other way to make abortion a constitutional right?

Group 5:
Can state constitutions guarantee more rights than the federal Constitution does? Can the Constitution be changed, even if a majority of Justices don't think it should be? How easily can the Constitution be amended? Why do you think the framers made it this way?

Group 6:
What are the implications if a constitutional right is announced and then taken away when the Court membership changes? Give an example of when this has happened (separate-

but-equal facilities for African Americans and whites is one). Do you feel that, if new Court members believe that a previous constitutional decision was wrong, they have an obligation to abide by it? To overrule it? If so, why? If not, why not?

Group 7:
Would the Court's dramatically changing the law hurt the Court by making it seem "political" and hence less deserving of the moral authority traditionally accorded to it? Or would treating abortion as a policy issue best handled by Congress and the state legislatures actually help the Court remain "above politics"?

Two Days Before
Prepare a classroom lecture and/or student exploration activity that can include any of the following topics.

Contrast Between Rights and Privileges
On the chalkboard or on an overhead transparency, write the words *rights* and *privileges*. Ask students to give examples of rights and, when appropriate, to define them (for example, liberty, pursuit of happiness, voting). Also ask for examples of privileges (holding office, participating in a press conference, driving). How do the two categories differ? Explain that rights are protected by law and cannot be taken away, but they can be limited. Privileges are not protected and can be taken away.

Bill of Rights and Section One of the Fourteenth Amendment
Explain or ask students to find out whose rights these documents protect. From what or from whom are these people being protected? Why was such protection necessary when the Bill of Rights was drafted? Is such protection necessary today?

Constitutional Amendments
Use the amendment format on page 9 to explain or help groups of students organize and review all the constitutional rights that have been recognized and protected through constitutional amendments. Have group leaders organize the material into one presentation chart.

Society's versus the Individual's Rights
Write on the chalkboard or on an overhead transparency, "Do only individuals have rights, or does society as a whole also have rights?" After discussion, point out that, in addition to securing the "Blessings of Liberty," the Preamble also states that the Constitution was ordained to "insure domestic Tranquility, . . . promote the general Welfare." Ask for definitions of terms from this constitutional passage. How do we determine the general welfare?

As in *Figure 1*, draw or have students draw a scale balancing individual rights and society's general welfare, supported by the Constitution, the Bill of Rights, and the Fourteenth Amendment. Actions, events, new interpretations by the government's three branches, or redefinitions can disturb the delicate balance. When this happens, something has to be done to restore the balance.

Explain or have students research, identify, and list laws, executive orders, and/or judicial decisions that tipped the balance in favor of the general welfare at the expense of individual rights, and the reverse. They should be prepared to explain what was done to regain the balance. *Example:* Slavery was recognized in the Constitution on the basis of an individual's right to own property. In the 1800s, the issue of slavery was destroying domestic tranquility and the general welfare. The Civil War and the resulting Thirteenth, Fourteenth, and Fifteenth Amendments expanded the nation's understanding of rights and gave "individual rights" and citizenship rights to all African Americans.

Day of Program
Since students will need pages 7–11 while viewing the video, you might want to have some extra copies on hand. On page 11, there are three sets of focus questions, one for each part of the program. If you are presenting the entire video in one session, review the questions with your students at this time, following the framework below. Otherwise, review one set at a time.

Part One: "Westphalia's" Abortion-banning Legislation
The panel for this video consists of 17 speakers. For the first set of focus questions, assign a specific speaker to each student, with at least two students having the same speaker so that they can compare and validate the speaker's remarks and position. A panel seating chart is shown on page 7. (A list of participants' names and titles appears on page 48.) Students will follow the questions while taking notes on speakers' positions. They should circle comments that they don't understand, and note words that evoke strong emotion, e.g., *execution*.

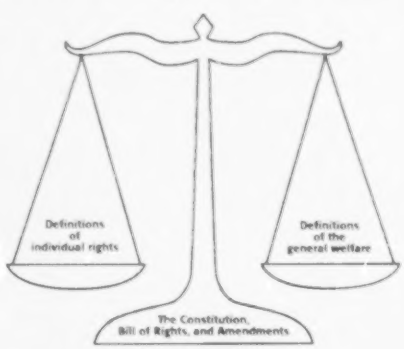


Figure 1:
Rights v. Rights: A Delicate Balance

Life and Choice after *Roe v. Wade*

PROGRAM ONE

OVERVIEW OF THE PROGRAM

Roe v. Wade, 410 U.S. 113 (1973), is the Supreme Court decision that established a fundamental constitutional right to abortion restricted only when there is a "compelling state interest." In this video program, moderator Charles R. Nesson of the Harvard Law School asks a panel of scholars, commentators, and pro- and anti-*Roe* activists to envision that *Roe v. Wade* has just been overturned by a "bare majority" of the Supreme Court. Individual states are now free to regulate abortions, including banning them outright. Nesson moves the panel through a sequence of changing scenarios during which they express their opinions regarding abortion's legal and political aspects.

The abortion issue has been one of the twentieth century's most agonizing conflicts. Classes viewing the program should remember that it deals with a question of law; therefore, the discussion focuses mainly on legal and political questions.

The program is divided into three segments, plus an introduction and conclusion by Fred Friendly.

Part 1 (2:45): "Westphalia's" Abortion-banning Legislation

This 30-minute segment begins with moderator Nesson's saying: "Well, we're in a new and extraordinary world, . . . " It deals with abortion-banning legislation enacted in the hypothetical state of Westphalia and the effects of the new law's enforcement.

Westphalia law has banned abortion except in cases of incest, rape, or imminent danger to the mother's life. Nesson asks panel members if they would support such a law. He then moves the hypothetical to a pregnant teenager who goes to a psychiatrist to obtain certification that her life is in imminent danger. She receives the abortion. Given a challenge to whether the girl was in fact in imminent danger, Nesson raises the issue of prosecuting the alleged law breakers, and he asks what legal arguments should or could be made in defense of the doctor who performed the abortion.

Part 2 (32:00): Federalism Versus Freedom of Choice

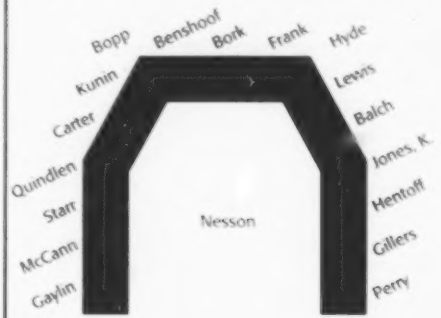
This 18-minute segment begins with moderator Nesson's saying, "Representative Hyde, you're pleased with the way things have gone so far in Westphalia." It examines federalism in the controversy when two states' abortion laws differ. The central question has to do with the extent to which Congress should or can go to force states to comply with a ban on abortion or to force all states to allow freedom of choice.

In opening comments to Representative Hyde, Nesson establishes that, while Westphalia has banned abortion, neighboring Fredonia allows freedom of choice; Fredonia is further advertising in Westphalia that residents there can get "abortions on demand" in Fredonia.

Part 3 (50:00): Supreme Court as "Super Legislature"?

This 37-minute segment begins with moderator Nesson's saying to Governor Kunin, "You've been elected President of the United States . . . you have the opportunity to appoint a new Justice." It brings into question the "politics" of presidential nomination of persons to the Supreme Court, as well as the Court's role as constitutional interpreter versus "super legislature."

A Supreme Court Justice has retired. President Kunin, elected by a majority of voters, favors freedom of choice. She has the opportunity to appoint a Justice who reflects the will of constituents who elected her. The scenario begins with President Kunin's questioning the potential nominee through Senate confirmation hearings, and then on to a hypothetical constitutional challenge which the Supreme Court must consider.



Special Terms

ACLU
ascendant
emanations
federalism
general welfare
hypothetical
inference
injunction
penumbras
precedent
pro-choice
pro-life
pseudonym
stare decisis
viable

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BACKGROUND FOR *ROE V. WADE*

Roe v. Wade, 410 U.S. 113 (1973), began when Jane Roe (a pseudonym for a single, pregnant woman who lived in Dallas and wished to have an abortion) asked the courts to review the constitutionality of a Texas statute that made abortion a crime unless performed to save the mother's life. Eventually, the case made its way to the Supreme Court, which, by a 7–2 majority, decided that the statute was unconstitutional because it violated a constitutional right of privacy that included the right to have an abortion. Further, the Court ruled that this newly recognized right was a "fundamental" constitutional right, meaning that any state abortion restriction would be struck down as unconstitutional unless the state could demonstrate that the restriction furthered a "compelling state interest" and was narrowly drawn to achieve this interest.

Two "Compelling" State Interests

Writing for the *Roe* majority, Justice Blackmun identified two state interests relating to abortion: an interest in protecting the pregnant woman's health and an interest in the "potential" human life embodied in the fetus. Depending on the pregnancy stage, these interests can become "compelling"—so as to permit state regulations to further them.

Abortion-related State Interest per Trimester (in months): *Roe v. Wade*

	0–3	4–6	7–9
Compelling for mother	no	yes	yes
Compelling for fetus	no	no	yes

Referring to medical literature, *Roe* divided human pregnancy into three parts—trimesters—and determined that, in the first trimester, the interest of the state is compelling neither for mother nor fetus. Thus, during these first three months of pregnancy, abortions are a private matter between the woman and her physician, and only minimal state legal restrictions that are aimed at protecting maternal health are permitted.

In the second trimester, however, since abortions at this stage pose risks at least as great as those of pregnancy, the state does acquire a compelling interest in protecting the woman's health. Thus, in the middle three months, the state is permitted to regulate abortion in order to ensure that the process remains safe for the mother.

In the third trimester, the state acquires a compelling interest in the fetus's potential life, which is now "viable"—that is, in Justice Blackmun's words, it has become capable of "meaningful life" outside the womb. During these last three months of pregnancy, the state may regulate or even prohibit a woman from having an abortion—so long as it is not necessary to preserve her life or health, including mental health.

"Undue Burden" Replaces "Compelling Interest"

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S.Ct. 2791 (1992), the Court upheld *Roe*'s "essential holding" barring states from prohibiting abortions before fetal viability. However, the Court rejected *Roe*'s "compelling state interest" standard (and the corresponding trimester framework for analyzing abortion restrictions) in favor of an "undue burden" standard that asks whether the challenged state law has the purpose or effect of creating "a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."

Applying this less-strict standard to five restrictive provisions of the Pennsylvania statute, the Court ruled unconstitutional the provision requiring women seeking abortions to notify their husbands; but the other four restrictions passed the undue burden test—including requiring parental consent or "judicial bypass," a 24-hour waiting period, and reporting requirements for abortion providers.

Constitutional Controversy and *Roe*

Roe is controversial not only because it legalized abortion, but also because of the way it did so. The Supreme Court—precisely because it is a court rather than a legislature—was not asked to decide the case on the basis of whether the Texas abortion law was good or bad as a matter of social policy. Rather, it was asked to decide the case as a matter of constitutional law. Thus, the Court's first order of business was to determine what—if anything—the Constitution has to say about abortion.

Implied Right of Privacy

Although the Constitution says nothing explicitly about abortion, the Court has decided that the Constitution and its amendments protect the right to have an abortion as part of an individual's right of privacy. Justice Blackmun's reading of prior Supreme Court cases persuaded him that "a right to personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." He added: "This right to privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate a pregnancy."

Precedent: Pro

The Court opinion most often cited as the precursor of Blackmun's analysis was delivered in 1965 in the case of *Griswold v. Connecticut*, 381 U.S. 479 (1965). There, the Court struck down a state law that made it a crime to use

or dispense birth-control information and advice. The law violated a constitutional right of privacy located, Justice Douglas said, in the "penumbras, formed by emanations" from specific guarantees that do appear in the First, Third, Fourth, Fifth, and Ninth Amendments and that are aimed at preserving private zones in which the state may not intrude without compelling justification.

Dissent: Con

Writing the dissenting opinion in *Griswold*, Justice Stewart crystallized the controversy engendered whenever the Court announces the discovery of a "new" constitutional right. While Justice Stewart found the Connecticut law restricting the dissemination of birth-control information to be "uncommonly silly" and "unwise, or even asinine" as a philosophical or social policy matter, at the same time he could "find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court. It is the essence of judicial duty to subordinate our own personal views, our own ideas of what legislation is wise and what is not."

Civil versus Criminal Penalties

Traditionally, civil, rather than criminal, penalties have been sought against individuals who have violated abortion laws. Cases dealing in criminal law are a matter of the state versus the individual and may result in punishment by imprisonment and/or fines. On the other hand, the purpose of civil law is to prevent an action or injury or to afford restitution to an injured party; a civil case is a question of individual versus individual, and its remedy is financial damages and/or an injunction, a court order not to take certain actions. Anyone who refuses to obey an injunction may be held in contempt and/or imprisoned, and the individual may lose the license to practice a profession.

Why the Right of Privacy Is Constitutionally Protected

The Preamble to the Constitution assures us that it was ordained to "secure the Blessings of Liberty." Part of the debate on its ratification focused on identifying rights under the broad umbrella of liberty. Many feared a listing of rights would too strictly define and possibly omit important rights that were not yet understood or even recognized. Thomas Jefferson wrote, "A bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference." He believed that the courts would come to be the "guardians of those rights . . . [and] resist every encroachment upon rights expressly stipulated."

When James Madison drafted a bill of rights in 1789, he included an amendment, which became the Ninth, against such encroachment. It states, "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." For over 200 years, we have been redefining and expanding what it means to have rights and how to protect individual rights from oppression by the government or the "tyranny of the majority." We look to the Bill of Rights and the Fourteenth Amendment for the constitutional foundation of each new definition.

Today, a constitutional right to privacy is generally recognized. However, there is much controversy as to where to "locate" this right in the Constitution. Although Supreme Court decisions since the 1890s have sought to ground a right to privacy in elements of the First, Fifth, and Fourteenth Amendments, the Constitution does not contain the word *privacy* or the phrase "right to privacy."

Insofar as the Court has construed the right of privacy to encompass the right of reproductive freedom (first in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and later, most notably, in *Roe v. Wade*, 410 U.S. 113 (1973), it "located" the right principally in the Fourteenth Amendment, stating that "the right to life, liberty, or property" guarantees "[t]his right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty and restrictions on state action." The Court also found justification in the Ninth Amendment's reservation of rights to the people. (See page 12 for a listing of Supreme Court cases involving privacy, many of which were cited by Justice Blackmun in *Roe*.)

Amendment	Recognized rights	Historical setting/ reason for adoption	Societal impact of right's recognition

Figure 2: Amendment format

Student Challenge 1: Learning to Analyze Perspectives Unemotionally

As Anthony Lewis says in this program, we are a nation of great differences. We have to have some means of rising above emotions so as to discuss political and legal arguments rationally. You can learn to react unemotionally to abortion and other controversial issues by learning to analyze perspectives. This process will help you pinpoint exactly where differences in values cause difficulties or impasses in your own and others' thinking and discussion about controversial issues.

1. **Acknowledge** your own emotional response to the position/argument: If a classmate says that abortion should be banned in all cases except danger to the mother's life, acknowledge that this statement makes you angry.

2. **Identify and describe** the specific concept or statements in the position/argument that triggered your anger: You identify your anger as stemming from the concept of banning all abortions, including cases such as rape and incest.

3. **Express** any value behind your classmate's statement and the reasoning or belief system behind it: You realize that your classmate believes the fetus is the same as a viable human life and a "person" protected under the Fourteenth Amendment.

4. **State** the opposing value and reasoning or counterargument: You say that a fetus is different from a human being and is not a "person." The Supreme Court has not interpreted the word *person* to include fetuses.

Adapted from Robert J. Marzano, *A Different Kind of Classroom: Teaching with Dimensions of Learning*, Association of Supervision and Curriculum Development (1992), p. 8.

Student Challenge 2: Learning to "Think as Argument"

"Thinking as argument" is a law-based process that you and your classmates can use to elevate discussion of highly controversial, complex issues from the personal and emotional to the analytical and evaluative level. By doing so, you will more effectively engage in "the thinking process . . . the central core of the American ethic . . . a symbol of our national destiny." This process is an essential habit of mind for people living in a democratic society. In order, the criteria for thinking as argument include

Presenting a position and its argument: Your position is your opinion. Your argument is a connected series of statements intended to establish your position. These statements should have supporting evidence that includes explanations, facts, or data such as statistics, interpretations, or legal definitions.

Employing a counterargument: Your opponents will present a counterargument that is used to undermine your argument by offering contrary evidence to prove your argument false, incomplete, or insupportable.

Rebutting: The rebuttal is your response to the counterargument. It attempts to reestablish your evidence as valid and to establish a logical conclusion.

Examine each of the following examples from the program you are going to view to determine whether it meets the criteria for "thinking as argument."

Example 1

Position and Argument: Under the Fourteenth Amendment, the fetus is a person. Henry Hyde says that the hypothetical Westphalia law does not go far enough in banning abortion because it allows execution of the innocent life—the fetus—in cases of rape and incest. *Counterargument*: To prohibit an abortion for a rape or incest victim is to victimize and punish the innocent woman further. The woman would be forced to carry to term a product of a violent, criminal act against her. This would be a violation of her Fourteenth Amendment right to liberty and privacy as implicitly recognized in the Constitution. *Rebuttal*: A violent, criminal act against the woman does not justify a violent act against the fetus's innocent life, thus violating the fetus's Fourteenth Amendment "right to life."

Example 2

Position and Argument: Dr. Jones says citizens are guaranteed Fourteenth Amendment protection of right to life and liberty. The hypothetical Westphalia law forces a teenager to go through with a pregnancy that is 25 times more dangerous to her life than a safe abortion. Therefore, the law is wrong because it endangers her life. *Counterargument*: Many believe that the fetus is a person. An abortion kills the fetus. Therefore, aborting the fetus violates its right to life. *Rebuttal*: A fetus is not a legally recognized person.

Adapted from Deanna Kuhn, "Thinking as Argument," *Harvard Educational Review* 1, no. 2 (Summer 1992).

Life and Choice after *Roe v. Wade*

PROGRAM ONE

WHILE VIEWING THE PROGRAM

Focus Questions

Part One: "Westphalia's" Abortion-banning Legislation
Using these questions as a framework, take notes on your assigned speaker's positions. Circle any comments or concepts that you don't understand, and note any words your speaker uses that evoke strong emotions, for example, execution.

1. Would your speaker support a law making abortion a crime except in cases of incest, rape, and imminent danger to the mother's health?
2. Would your speaker support the criminal prosecution of the persons involved in the abortion, including both mother and doctor?
3. What legal arguments would your speaker use in the doctor's defense?

Part Two: Federalism Versus Freedom of Choice
Follow the instructions in "Learning to 'Think as Argument'" to analyze the question your group has been assigned for this portion of the program.

4. If there was a majority in Congress against abortion rights, how far can Congress go to force conformity of all states in banning abortion? Laws? Federal funds?
5. Would it be proper for the federal government to withhold medicaid funds from states such as Fredonia that will not legislate a ban on abortion?
6. What if the congressional majority was pro-choice? What would be the proper role of Congress in trying to force states such as Westphalia to conform in getting rid of their bans?
7. Is this a state's rights question or should it be resolved at the federal level?

Part Three: Supreme Court as "Super Legislature"?
Follow the instructions in "Learning to 'Think as Argument'" to analyze the question your group has been assigned for this portion of the program.

8. Is it politically proper and/or desirable for the President to nominate persons to the Supreme Court based on prior knowledge of the nominee's position on issues critical to the President's administration?
9. What kinds of questions should a nominee be expected to answer in confirmation hearings?
10. The hypothetical case of *Jones v. Westphalia* challenges the law and the conviction of Dr. Jones, who performed the abortion. What constitutional arguments could be made before the Supreme Court by each side in a challenge to the constitutionality of the state law of Westphalia banning abortion?
11. *Stare decisis* means "Let the decision stand." It is the doctrine that principles of law established in earlier cases should be accepted as precedent in similar cases that follow. How significant should *stare decisis* be to the Supreme Court's decision in the case of *Jones v. Westphalia*?
12. As Anthony Lewis says at the program's conclusion, "It has been the habit of this country to take the ultimate political issues to law, to make them legal questions . . . for good or for ill, we look to the Supreme Court as the voice for this very old document." For critical issues like the right to choose abortion, should the Supreme Court be a "super legislature"?

AFTER VIEWING THE PROGRAM

Classroom Discussion

1. Using their notes on speakers in part one, students might analyze any of the various arguments using the process outlined in "Learning to Think as Argument." A student coordinator should direct students in filling out the chart below on the chalkboard or on butcher paper. A list of participants alongside may be helpful. Students will find that not all arguments were followed by counterarguments and/or rebuttals. They should decide what any missing elements might be and write them in a different color.

Position/Argument	Counterargument	Rebuttal

2. Students might place their speakers on this continuum in terms of the speakers' expressed opinions.

Least Restrictive		Most Restrictive
Complete Freedom of Choice	Regulate or Limit Abortions	Complete Ban on Abortions

Extension Activities

Reports and Essays

One or more students might report on or write an essay about any of the following topics.

1. Professor Carter states that laws are compromises. Identify a point of seemingly irreconcilable difference in the positions expressed in this program. How can compromise be achieved?

2. Quindlen speaks of her "misapprehensions about how the government works," saying that she kept wondering where the woman was in the discussion. What did Quindlen mean? Were her comments valid?

3. Lewis commented on the regional, cultural, and religious differences among Americans. What does it say about our society and us as a people that we look to the law for resolution of our conflicts?

4. Was the thinking-as-argument process helpful in discussing the controversial issues in this program? Why or why not? Talk about each step of the process: argument, counterargument, rebuttal.

5. Fred Friendly introduces the program by saying, "... [The] thinking process is the central core of the American ethic and is much a symbol of our national destiny as the American eagle. . . ." In the conclusion, he refocuses the important point to remember, no matter how painful the content:

> As we view the abortion issue, all sides look to the law, the Bill of Rights, and the Fourteenth Amendment to validate an ethical and moral position. . . . This 90-minute dialogue was not intended to make up anybody's mind, but to make the agony of decision making so intense that you can escape only by thinking.

What is your reaction to this statement? In a functioning democracy, can we escape the agony of decision making? Can a democracy survive without it?

Research

1. The decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S.Ct. 2791 (1992), was handed down on June 29, 1992. Where do the Supreme Court Justices fall on the continuum under "Class Discussion" in question 2? Base your answer on the Justices' concurring and dissenting opinions. What role do you think *stare decisis* played?

2. Examine and report on any of these Supreme Court cases dealing with certain aspects of the right to privacy.

Boyd v. United States, 116 U.S. 616 (1886)
Union Pacific R. Co v. Botsford, 141 U.S. 250, 251 (1891)
Meyer v. Nebraska, 262 U.S. 390 (1923)
Pierce v. Soc. of Sisters, 268 U.S. 510 (1925)
Olmstead v. United States, 277 U.S. 438, 478 (1928)
Palko v. Connecticut, 302 U.S. 319, 325 (1937)
Skinner v. Oklahoma, 316 U.S. 535, 541–42 (1942)
Griswold v. Connecticut, 381 U.S. 479, 484–485 (1965)
Loving v. Virginia, 388 U.S. 1,12 (1967)
Katz v. United States, 389 U.S. 347, 350 (1967)
Terry v. Ohio, 392 U.S. 1, 8–9 (1968)
Stanley v. Georgia, 394 U.S. 557, 564 (1969)
Eisenstadt v. Baird, 405 U.S. 438, 453–454 and 460, 463–465 (1972)

3. Create a time line of events related to the constitutional right to privacy/reproductive freedom issues. You might want to consult such resources as the VanBurkleo article and other suggested resources noted on page 46, as well as Court opinions from cases cited in item 2 above.

PROGRAM TWO ★ The First Amendment and Hate Speech

BEFORE VIEWING THE PROGRAM

Program Uses

This program can supplement any class in which the study of current events or current social problems is appropriate. For history classes, it can be used when examining minorities' efforts to advance their rights (such as the abolitionists' efforts prior to the Civil War and the civil rights movement) or government efforts to limit speech (such as during the Alien and Sedition Acts debates in the 1790s, every war including the Persian Gulf War, and the Cold War).

Government classes will find this tape helpful in discussing the current "political correctness" debate or in studying the Bill of Rights' or the Supreme Court's roles. Sociology or human understanding classes can use the program to discuss prejudice and the methods by which tolerance and diversity can be achieved.

Instructional Approaches

Depending on course objectives, two instructional approaches can be used. If the objective is to expose students to the complexity of First Amendment issues and to give them an appreciation of the balancing of values that takes place in speech regulation, the entire program may be viewed without breaks. If, however, the teacher wishes to use the program to examine specific First Amendment issues, pausing the tape after parts 2, 4, and 6 will logically combine discussion topics.

Early Orientation

A few days before your class views the program, provide each student with a photocopy of pages 14–19. Have them read up to "While Viewing the Program" to become familiar with free-speech issues and cases, and with legal terms and other information needed to understand the program and to work with these instructional materials.

Class Discussion

Two or three days before the class views the program, conduct or have students lead class discussions involving the following topics.

1. Review the special terms on page 15 to ensure that students understand the vocabulary, ideas, and issues that will be discussed during the program.

2. Write the term *First Amendment* on the board. Discuss what rights are protected. Does the amendment apply only to Congress and the federal government? Does "no law" actually mean that there can be no limitation on free speech?

3. Review the Jefferson and Holmes quotations on page 18. These are two of the most important quotations on free speech. Jefferson's is from his first inaugural address. He is criticizing the Alien and Sedition Laws enacted by the Federalists and argues that ideas must be met with reason, not suppression. The second quotation is from a dissenting opinion by Justice Oliver Wendell Holmes in *Abrams v. United States*, 250 U.S. 616 (1919). Discuss the quotes and the concept of a marketplace of ideas.

4. Write on the chalkboard the childhood saying, "Sticks and stones may break my bones, but names will never hurt me" and this quotation from Lord Acton mentioned toward the end of the program: "The society that is most free is the one that is the most responsible." Discuss whether it is true that names do not hurt and whether the saying reflects U.S. law. Also discuss the need to develop responsible speech and the limits of imposing responsibility through law.

Day of Program

Since students will need pages 14–19 while viewing the video, you might want to have some extra copies on hand. Review and assign parts one and two of the worksheet on page 19 and view the tape without break if your teaching objective is to focus on the Bill of Rights generally and the balancing involved between the freedom of speech and hate speech regulation.

If your objective is to study the freedom of speech in greater detail, however, pause after parts 2, 4, and 6, and use part three of the worksheet on page 19 to identify constitutional issues basically in the order in which the tape raises them. Ask students to take notes during the program and to complete the worksheet either individually or in small groups.

The First Amendment and Hate Speech

PROGRAM TWO

OVERVIEW OF THE PROGRAM

The First Amendment and Hate Speech debates the appropriateness of regulating hate speech that demeans, offends, angers, or attacks an individual or group on the basis of race, ethnicity, gender, religion, or sexual orientation. Ethnic jokes, racial slurs, homophobic remarks, and displaying swastikas or burning crosses are all examples of hate speech.

There is no doubt that hate speech can harm. It conveys a message that certain groups are unwelcome in a society, and it appeals to prejudice. Certainly, governments have the responsibility and, in many instances, the duty to assure equal access to all its citizens and to promote tolerance. The key question is how government may go about achieving these goals.

One approach is to criminalize and punish hate speech, but this conflicts with the values that the First Amendment protects. First Amendment advocates contend that all speech, even speech we loathe, must be protected. The proper method of confronting hate speech is with other speech, not with suppression; speech may be suppressed only when it turns into action. During this program, participants on both sides of the issue argue about where to strike the balance between regulating hate speech and affording First Amendment protection.

Midville Dilemma

The program's hypothetical involves a dilemma that arises at Midville State University, where a dynamic student named Evan Earle has formed a group of like-minded students called "Aryan Truth." The "Aryans" oppose affirmative action, deny that the Holocaust occurred, and generally favor white supremacist views. Its members have begun to engage in anti-African-American, anti-Semitic, and antigay speech on campus. What should the university do? Is condemning hate speech enough, or is more required? *Should* the university censor it? Punish or expel Earle? *May* the university do these things? The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press." Does this provision limit the university's possible responses?

Program moderator Arthur Miller of the Harvard Law School leads the discussion through a series of incidents ranging from campus speakers and racial supremacy meetings to insulting comments and cross burning, from speech that is most likely to be protected to speech that includes actions that may be regulated. As the distinguished panel debates important constitutional issues, spontaneous, unexpected answers often surface. Frequently, liberals end up on the same side as conservatives, and groups that the public generally sees as being on the same side of an issue split over the details. The complexity of the topic and the need to seek compromise are clearly evident. Viewers are able to observe firsthand the painstaking process by which political consensus is reached.

This program is divided into eight segments, plus host Fred Friendly's introduction and conclusion.

Part 1 (2:00): Methods of Confronting Hate Speech

This 6-minute segment begins with moderator Miller's saying: "Let me take you to a wonderful city." Many colleges have enacted codes regulating hate speech. These are advanced as a means of promoting a healthy learning environment for minorities, but critics argue that the codes stifle opinions and the exchange of ideas. This segment discusses campus rules concerning campus speech that is offensive to minorities, primarily focusing on methods of confronting hate speech. (A discussion of reasons for regulating campus hate speech takes place at the end of Part 5.)

Part 2 (8:00): Control of State and Local Governments

This 6-minute segment begins when moderator Miller asks Professor Kennedy, "Does [Earle] have a right to say that?" It points out the well-established constitutional principle that the First Amendment and many other aspects of the Bill of Rights control state and local governments, including public universities such as Midville State. At one time, the fact that the First Amendment says, "Congress shall make no law . . . " meant that it was directed only at Congress, but, as the participants conclude, those days are long gone.

Part 3 (14:00): Free Speech and the Newspaper

This 7-minute segment begins with moderator Miller's saying to Mr. Berrill, " . . . you are the co-editor of the Midville school newspaper." It discusses the question of whether the campus newspaper should run an advertisement of a meeting to organize and promote a white supremacist group. A general discussion of freedom of the press is included.

Part 4 (21:00): Free Speech and Campus Meetings
This 8-minute segment begins when moderator Miller says to Professor Kennedy, " . . . the request has come in to hold this [Aryan] meeting in the school auditorium." It affirms the right of a controversial speaker to use campus facilities and discusses the concept of content-neutral and reasonable time, manner, and place restrictions on speech.

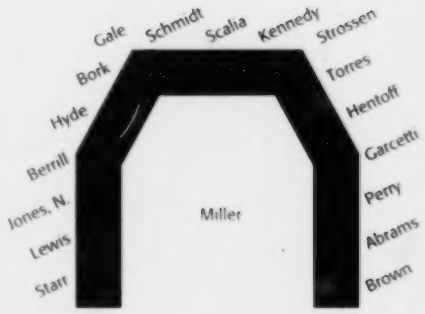
Part 5 (29:00): Permissible Demonstrations and Hate-Speech Regulation
This 7-minute segment begins when moderator Miller says, "On Martin Luther King's birthday, [the Aryans] decide to conduct a dumb show . . . " It deals with an offensive and vulgar demonstration that the group is planning. The consensus is that the demonstration is permissible, but there are some dissenters. Also included in this segment is a strong argument for regulating hate speech. The regulation proponents argue that the speech harms its targets, encourages a climate of intolerance, and limits the ability of individuals to participate fully in the educational community.

Part 6 (36:00): "Fighting Words"
This 6.5-minute segment begins with moderator Miller's saying, "The nature of the conduct has shifted somewhat." It involves the "fighting words" doctrine, which allows the state to prohibit speech that is likely to provoke a reasonable person to react violently.

Part 7 (42:30): First Amendment Coverage for Private Institutions?
This 7-minute segment begins when moderator Miller says, "Many people around this table are quite obviously much taken by the marketplace of ideas and free expression." It discusses the fact that the First Amendment does not apply to private institutions such as schools and businesses, as is proposed in a Congressional bill to expand the coverage of the First Amendment to certain private colleges.

Part 8 (48:00): Cross-burning Incident
This 6-minute segment begins when moderator Miller says, "All of these efforts inside Midville haven't stopped the growth of Aryan Truth, . . . " It deals with a cross-burning incident that resembles the facts of a Supreme Court case (*R. A. V. v. St. Paul, Minnesota*, 112 S.Ct. 2538 (1992), that was decided after this tape was produced. Facts and issues of this case and an exercise involving its decision appear on pages 17–18. The opinion was written by Justice Scalia, which is why he does not wish to directly discuss the incident during the program.

Just prior to Friendly's ending tribute to Thomas Jefferson, Justice Scalia discusses the responsibility of citizens not to pursue their free speech rights to the extent that they injure others.



[I]n our country, we have those three unspeakably precious things: freedom of speech, freedom of conscience, and the prudence never to practice either of them.

Mark Twain

Special Terms

abridge	liberal
ACLU	McCarthyism
alien	majority and concurring opinions
blasphemy	nonpolitical speech
conservative	nonspeech
content-neutral restrictions	ordinance
Due-Process Clause	political speech
dumb show	prior restraint of the press
epithet	protected/unprotected speech
fighting words	sedition
hate speech	slander
homophobic	solicitor general
imminent	suppression
incendiary speech	symbolic speech
libel	time, place, and manner restriction

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Historical Perspective on First Amendment Freedoms

The history of free speech is tied to historical development. Throughout the nineteenth and early twentieth centuries, bigoted expression toward political, religious, racial, ethnic, and gender minorities was tolerated. It was not until 1917–19 that some innovative law scholars like Learned Hand and Zechariah Chafee began to realize and state publicly that speech had a proper social purpose and function and, possibly, an improper one. In opposition to wartime repression during World War I, speech began to be weighed on a scale of whether or not its expression served the public and the public dialogue, an argument that stressed its social value and societal utility. The time seemed right to assess the impact of public ridicule of Jews, African Americans, Catholics, and women.

Ironically, this did not translate into legal action either in the form of statutes or First Amendment issues. There was some tolerance after the 1920s of unpopular political expression, but it came only from judges and Supreme Court Justices. Further, the Justices were only interested in "political" speech and its ramifications, whether it threatened the government, property, or the public order. It took World War II and the postwar civil rights movement, plus a backlash against McCarthyism, to raise the possibility that government might have some positive responsibility to protect even expression, as well as other rights, of "discrete and insular minorities."

BACKGROUND FOR MIDVILLE ISSUES

Protection under the Due-Process Clause

It is not immediately apparent why an amendment addressing the U.S. Congress should have any bearing at all on a state university's policies on student discipline. In the 1925 case of *Gitlow v. New York*, 268 U.S. 652 (1925), however, the Supreme Court determined for the first time that the First Amendment's guarantees of free speech and free press are "among the fundamental personal rights and 'liberties' protected by the Due-Process Clause of the Fourteenth Amendment," which provides that no state shall deprive any person of life, liberty, or property without due process of law. Thus, the *Gitlow* decision seemed to allow harsh government criticism by those seeking to expose and condemn its policies and behavior.

Today, it is accepted that the entire First Amendment—along with most of the rest of the Bill of Rights—is "incorporated" by the Fourteenth Amendment's Due-Process Clause and therefore applies to state institutions as well as to the federal government. The fruits of this change are many and have wide application.

Distinctions Between Protected and Unprotected Speech

As the Court noted in the 1969 case of *Tinker v. Des Moines School District*, 393 U.S. 503 (1969), students do not "shed their constitutional rights to freedom of speech or expression at the school house gate." On the other hand, not every speech regulation is an abridgement of the free speech protected by the First Amendment. Justice Oliver Wendell Holmes put it memorably: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic." Deliberate abuse of speech is properly punishable.

"Marketplace of Ideas" or "Fighting Words"?

One constitutional theory that emerges in this video is that, by giving each citizen the right to express any idea—popular or unpopular, lofty or repugnant—the First Amendment guarantees a lively "marketplace of ideas" in which the best ideas will flourish and the worst will wither. Does the First Amendment distinguish, then, between "political" speech, which can be subjected to counterarguments in this marketplace, and nonpolitical speech that is thought likely to spark immediate violence? Political speech is protected because of its democratic function; but there are several limitations on free speech. Obscenity, sedition, slander, libel, and blasphemy are not protected, for example.

In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the Court did hold that a state could prohibit the use of *fighting words*—those uttered face to face that "by their very utterance inflict injury or tend to incite an immediate breach of the peace." But the decision in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), protected the Ku Klux Klan leader whose incendiary speech was broadcast on TV because only the "incitement of imminent lawless action" was punishable expression.

Written Expressions and Symbolic Speech

The courts also consider whether written expressions and symbolic speech such as certain physical actions raise First Amendment issues. For example, the display or defacement of a symbol, whether a swastika, American flag, or burning cross, can arouse a strong reaction and convey an idea or opinion as effectively as speech, and thus may—or may not—qualify as "fighting words."

In *Cohen v. California*, 403 U.S. 15 (1971), during the Vietnam era, the government was not permitted to punish a draft resister who wrote "F—

the Draft" on the back of his jacket in a public place. Courts eventually ruled that groups like the Nazis and the Ku Klux Klan have a right to assemble and march, and that parade permits should be issued. For example, in *Village of Skokie v. National Socialist Party,* 373 N.E. 2d 21, 69 Ill 2d 605 (1978), the Illinois Supreme Court read the U.S. Supreme Court's opinions as requiring it to allow a group of American Nazis to demonstrate and display swastikas in Skokie, Illinois, a Chicago suburb with a large Jewish population including many Holocaust survivors. In *Texas v. Johnson,* 491 U.S. 397 (1989), the Court itself overturned a Texas statute that banned the burning of the American flag. When an irate Congress and president responded to the decision by enacting a new federal law punishing flag burning, the Court struck it down as well in *U.S. v. Eichman,* 496 U.S. 310 (1990).

Protection for Tolerance and Intolerance Alike?

The hate-speech issue explored in this program stems from another problem—private citizens' assaults upon minorities and the state effort to impede such behavior, such as in the cross-burning case, *R. A. V. v. St. Paul, Minnesota,* 112 S.Ct. 2538 (1992), where a Minnesota juvenile was convicted of burning a cross in an African-American family's yard in violation of a St. Paul statute that criminalized cross burning and other acts that arouse "anger, alarm, or resentment" on the basis of race, religion, or gender. The youth argued that the law violated the First Amendment. See column three for more details of this famous case.

Public Property as "Open Forum"

In the program's discussion hypothetical, the university decides to grant the Aryans permission to hold a rally in its auditorium. Why? The circumstances are vital to the university's decision: the government's authority to limit speech on public property varies depending on the property's nature.

If the public property is not "by tradition or designation a forum for public communication," the government can forbid speech there in order to use the property for its intended purpose. On the other hand, if the property is either an "open forum" (such as a public park that is historically associated with the free exercise of expressive activities) or a "limited open forum" (sometimes made available to the public for expressive activities), the government cannot suppress speech with which it disagrees while allowing speech with which it agrees. It still may enforce reasonable content-neutral "time, place, and manner" speech restrictions, but it may not discriminate based on the speech's political content. If the First Amendment did not protect "racist" speech on campus, the university could not ban it without also inadvertently stifling constitutionally protected speech concerning, for example, the merits of the university's affirmative action policy.

But, even if the First Amendment does protect bigoted speech generally, few would doubt that the university retains the right to prohibit students from engaging in face-to-face harassment or intimidation of others.

***R. A. V. v. St. Paul, Minnesota,* 112 S.Ct. 2538 (1992)**

Facts: Angered that an African-American family had recently moved into his neighborhood, a 17-year-old and several of his friends burned a small cross on the family's lawn late one night. He is arrested and charged in juvenile court with violating an ordinance regulating hate speech. The ordinance states that "Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender . . . shall be guilty of a misdemeanor." R. A. V. is also charged with racially motivated assault, which he does not contest. He is not charged with trespassing or intimidation.

Issue:

May a person be prosecuted for displaying material that arouses anger and resentment as defined in the ordinance, or does the First Amendment protect such conduct? Which opinion

Legal and Other Interventions Involving Hate Speech

The First Amendment mandates that Congress shall pass no law limiting freedom of speech, the press, or the right of citizens to assemble. Throughout U.S. history, the meaning of these words has been debated. Does the First Amendment absolutely prohibit all regulation of speech, or may some limitations be imposed?

Over the years, the conclusion has been reached that the prohibition is not absolute. Speech can be hurtful, and there are laws regulating its use if it is directed at an individual. For example, the fighting-words doctrine allows the state to regulate words that are likely to provoke a breach of the peace. In civil law, there are actions for libel and slander and for intentional infliction of emotional stress. But limitations will be allowed only if there are very compelling reasons to justify them, and those proposing limitations are faced with a heavy burden of showing necessity. Insulting epithets used in an abstract and descriptive sense are protected speech.

Those who argue for free speech believe that confronting hate speech by suppressing and criminalizing it is not the right approach. Rather, citizens need to develop tougher skins, and responsible citizenship must be taught.

summarizes the Supreme Court's majority decision in the case?

Opinion A:
The cross burning may be punished under the ordinance, which applies only to expression not protected by the First Amendment. States have authority to prohibit forms of expression that are likely to provoke imminent lawless conduct or that could be considered "fighting words" that by their very utterance inflict injury or tend to incite an immediate breach of the peace. Further, the ordinance affects only those forms of expression that one knows or should know will create anger, alarm, or resentment based on racial, ethnic, gender, or religious bias. Thus limited, the ordinance could therefore apply only to unprotected speech as previously defined by the U.S. Supreme Court and is not overbroad.

Opinion B:
Cross burning and other such acts can be prosecuted under a number of existing statutes sufficient to prevent such behavior without adding the First Amendment to the fire. Although the youth could have been charged and convicted of other crimes such as arson, trespassing, assault, and making terroristic threats, the statute itself is unconstitutional because it censors only the opponents of racial tolerance, while leaving proponents to express themselves freely. This sort of selectivity creates the possibility that the city is seeking to handicap the expression of particular ideas. Content-neutral alternatives are available that do not single out the content of expression.

Opinion C:
The law is unconstitutional, not because it outlaws cross burnings, which are not entitled to constitutional protection as true "fighting words," but because it is overbroad. As written, it also makes criminal expressive conduct that causes only hurt feelings, offense, or resentment—speech that is protected by the First Amendment. The Court mustn't be distracted from its proper mission by the temptation to decide this issue over what's politically correct speech in a culturally diverse society. There is fault in deciding that a state cannot regulate speech that causes great harm unless it also regulates speech that does not. There is great harm in preventing a city's people from *specifically* punishing race-based "fighting words" that prejudice their community.

> If there be any among us who wish to dissolve this Union or to change its republican form let them stand undisturbed, as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it.
>
> *Thomas Jefferson*

> . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.
>
> *Oliver Wendell Holmes*

The First Amendment and Hate Speech

PROGRAM TWO

WHILE VIEWING THE PROGRAM

Part One: Panel Members' Perspectives

Follow your instructor's directions in answering these questions.

1. Which speakers would favor regulating hate speech? Why?
2. Which speakers are outspoken defenders of free speech? Why? Who is the most outspoken?
3. Which speakers do you agree with? Disagree with?
4. List references to the concept of a marketplace of ideas.
5. Why do many of the minorities and women on the program seem more willing to regulate hate speech?
6. Is free speech important to minorities and women?
7. What does responsibility have to do with free speech?

Part Two: University, Government, and Controversy

Follow your instructor's directions in answering these questions.

1. May a university discipline someone for making racist statements? If yes, in what manner?
2. Should schools be public forums? Are universities treated differently than high schools?
3. Does the Bill of Rights apply to state and local governments?
4. May the government regulate what is published in newspapers?
5. May a college that generally makes rooms available to speakers refuse to allow them to talk because their views are controversial?
6. What are time, manner, and place restrictions?
7. May a city or a university prohibit a march or demonstration held at a reasonable time and place because it will offend the majority of the people?
8. What are "fighting words"?
9. Does the Bill of Rights apply to private businesses and private colleges?
10. May a person be punished for displaying offensive symbols, such as swastikas or burning crosses?

Part Three: Is It Constitutional?

Cross out the correct answer.

Yes No **1.** A high school prohibits students from wearing black arm bands as a protest to the Vietnam war.

Yes No **2.** The government obtains a court order closing a newspaper for publishing articles it dislikes.

Yes No **3.** A public university prohibits a speaker who advocates racial intolerance from speaking in its building.

Yes No **4.** A city restricts residential neighborhood demonstrations to daytime hours.

Yes No **5.** In an effort to prevent a Nazi parade, a city passes an ordinance prohibiting swastika display and requiring payment of a large parade license fee.

Yes No **6.** A private business adopts a policy that prohibits distributing political literature during work hours.

Yes No **7.** A person is prosecuted for calling another person a racially offensive name.

Yes No **8.** A person is prosecuted for trespassing and intimidation after putting a burning cross on his African-American neighbor's lawn.

AFTER VIEWING THE PROGRAM

Use either or both of the following group exercises to help students apply the program information to real situations.

1. Ask students to analyze the Supreme Court case *R. A. V. v. St. Paul, Minnesota,* 112 S.Ct. 2538 (1992), as summarized on pages 17–18. Ask students to guess which was the majority opinion of the Supreme Court, and why. Which was the concurring opinion?

2. Have students decide whether the activities listed in part 3 of the worksheet are constitutional.

Answers

To exercise 1, page 18:

(Opinion B) The Supreme Court majority ruled that the St. Paul ordinance was unconstitutional because it selectively prohibited speech that communicated messages of racial, gender, or religious intolerance, creating the possibility that the city was seeking to handicap the expression of particular ideas. Opinion A is essentially the Minnesota Supreme Court's reasoning, which was reversed. Opinion C is the opinion of four Justices who concurred in the result, but on the grounds that the statute was overly broad.

To Part 3, page 19: (1) No, the Supreme Court has ruled that the Bill of Rights does not stop at the school house door, and that demonstrations that do not disturb the educational process are protected free speech. (2) No, this is a classic example of prior restraint of the press. (3) No, a public university that has a policy of making a building available for speeches may not prohibit speakers because of their speeches' content. (4) Yes, this is an example of a reasonable time, place, and manner restriction on the freedom of speech. (5) No, the city must allow the parade to take place. (6) Yes, the First Amendment applies to state and local governments, but it does not apply to private schools and businesses. (7) No, unless the law under which a person is being prosecuted is a general prohibition of fighting words without regard to the particular characterisitics of the person to whom the fighting words are directed. (8) Yes, the prosecution of the criminal act is allowed. However, preventing the display of an offensive symbol has been ruled unconstitutional.

Chronicle of a Rape Trial

BEFORE VIEWING THE PROGRAM

Two or Three Days Before

Photocopy pages 22–27 for students and assign pages 22–24 as reading. Then conduct or have students lead any of these activities.

1. This program requires frank discussion of sexual behavior, and portions of these activities involve controversial and highly sensitive topics. Enlist students' mature responses in dealing with the topics, especially when they are completing activity 3. On page 10 of this booklet, there are two student challenges called "Learning to Analyze Perspectives Unemotionally" and "Learning to 'Think as Argument'" that your class has already used in connection with activities for the first program, *Life and Choice after Roe v. Wade*. Have students review those activities and adapt similar ones for this program.

2. Review the special terms on page 23 to ensure that students understand the vocabulary, ideas, and issues that will be discussed during the program.

3. Give a copy of page 25 to students and ask them to complete the survey individually, following the directions. They should not sign this sheet, but they should mark it with some sort of identification code known only to them. Encourage their total honesty, assuring them a right of privacy—no one will know how they answered. Collect the papers, tabulate the results using the table format provided on the worksheet on page 26, and post them.

Students will need these pages again for the exercises under "After Viewing the Program," so have the students reclaim their papers using their codes. If appropriate for your class's maturity level, small student groups can discuss reasons why the results may have turned out as they did for individual items.

4. Ask students to review the Constitution and its amendments to identify any rights involved in the survey's items. These might include First Amendment individual rights to freedom of speech and the press; Fifth and Fourteenth Amendment guarantees not to be deprived of liberty without due process of law; Sixth Amendment rights to a fair and public trial, an impartial jury, compulsory process for obtaining favorable witnesses, and the right to counsel. Students may also identify the right to be presumed innocent of a crime until proven guilty, stressed in program 5, and the right to privacy, stressed in program 1. Note that neither of these rights appears specifically in the U.S. Constitution.

Day of the Program

Since students will need pages 22–27 while viewing the program, have extra copies on hand. Instruct the class to jot down arguments and information that the video provides for any item of particular interest to them, including the panel members' opinions. Later, a student panel will discuss these items.

Tom Herzberg

Two Accused: Chronicle of a Rape Trial

PROGRAM THREE

OVERVIEW OF THE PROGRAM

Rape is a criminal offense that occurs when a person engages in sexual intercourse with another person without that person's consent. In *Two Accused: Chronicle of a Rape Trial*, a college student named Jane Bright charges the governor's son, Joe Fame, with *date rape*, also known as *acquaintance* and *nonstranger* rape—a crime whose definition varies by state, but one in which the victim knows the attacker. Date rape is prohibited by state laws that make rape a crime. Since most rape victims know their attackers, date rape constitutes a significant number of rape cases and important legal and ethical questions that this program explores.

Joe and Jane agree that on a hot, humid night, Jane accepted Joe's invitation to leave the crowded, noisy, sweltering party downstairs to cool off in his air-conditioned bedroom, but they disagree about what happened there. Joe admits to having sex with Jane, but he says she consented—the usual defense in these cases. She says she told him no. No one could have overheard their conversation because of the noise. Thus, as in most date rape cases, there are no witnesses.

A Media Trial?

Joe hasn't been arrested yet, but newspaper headlines are already proclaiming "Fame Kid Faces Rape Rap." Before the jury is selected, newspapers disclose that Jane has had sex with a number of other men and that other women are willing to testify that Joe sexually attacked them. The prosecution and defense lawyers begin to make statements to the press in order to counteract the adverse publicity; the defense has even hired a public relations firm. Joe is being tried in the media, and so is Jane. What effect will all this have on the case's outcome?

Jane's Word Against Joe's

The jury will be asked to weigh Joe's word against Jane's. If both witnesses present credible testimony, how can the jury decide who is lying and who is telling the truth? Can the court prevent the jury from hearing and being influenced by media allegations regarding Jane's and Joe's prior sexual conduct? From hearing courtroom testimony about it? Should the court prevent these things? May it? Moderator Kathleen Sullivan of the Harvard Law School leads a distinguished panel as they confront the difficulty involved in balancing the rights of plaintiff and defendant in date rape cases. The program is divided into four segments, with an introduction and conclusion by host Fred Friendly.

Part 1 (2:30): Rape Shield Laws and Pretrial Discovery

This 6.5-minute segment begins when moderator Sullivan says to Ms. Fairstein, "you're the sex crimes prosecutor for the city of Verity." As the panel's discussion reveals, victims of rape have been stigmatized historically. A number of states have designed *rape shield laws* to make information about prior sexual activity inadmissible in court so as to protect rape victims. However, both sides may and will gather this and related information in great detail during the pretrial discovery stage, and this information will most likely get into media, especially in a case that involves a governor's son. There are no legal means to prevent this.

Part 2 (9:00): Criminal Defendant's Rights

This 6-minute segment begins when moderator Sullivan says to Ms. Simms, "What do we have to prove to win this case? Do I have to prove I said no?" We learn that, legally, Joe has the advantage from the outset. The Constitution stipulates the criminal defendant's rights. The Sixth Amendment guarantees Joe a fair trial with an impartial jury, in the district where the alleged crime was committed, as well as the right to have a compulsory process for obtaining witnesses in his favor. The Due-Process Clauses of the Fifth and Fourteenth Amendments require that criminal defendants be presumed innocent until proven guilty. The defendant will have the assistance of counsel, and there will be no deprivation of life, liberty, or property without due process. Proof of guilt will have to be "beyond a reasonable doubt." While this standard will not require each juror to eliminate all doubts about Joe's guilt in order to convict him, it is a much tougher burden of proof than the typical "preponderance of the evidence" standard used in most civil trials. Jane's misgivings only increase, although she finally decides that the right decision is to put Joe on trial and try to seek a conviction.

Part 3 (15:00): Press Coverage

This 20-minute segment begins when moderator Sullivan turns to Mr. Nachman and says, "you're the editor of the *Verity Post*." While many newspapers have a policy of not publishing rape victim's names, there's no such protection toward suspected rapists. Through connections at the police department and courthouse, the *Post*

and other media almost immediately learn and publish Jane's allegations, naming Joe. Although there is a state law against publishing rape victims' names, some newspapers have also named Jane. As part of First Amendment freedom of the press, the state would need a very compelling, overriding interest to sustain punishment of an accurate description.

Part 4 (35:00): Gag Laws, Admissible Evidence, and Public Trials

This 21-minute segment begins when moderator Sullivan turns to Judge Snyder and says, "you're the presiding judge." None of the media information is admissible at the trial, but it could reach and influence the jury. The presiding judge may issue gag orders to silence the attorneys, but not the press. The judge constantly and repeatedly admonishes the jury to ignore the press. But, in accordance with the Bill of Rights, the trial will remain public as a means to assure that the judicial process is functioning properly.

Despite rape shield laws, some panelists argue, relevant information about prior sexual conduct should be admitted, as happens in some rare cases, despite rape shield laws. Others argue that, in the present case, this information has no relevance, since the issue is whether Jane consented on that night.

Special Terms

abstinence
chastity
compulsory witness
credible testimony
criminal versus civil offense
gag laws
rape shield laws
reasonable juror
sequester
stigmatize
voir dire

BACKGROUND FOR DATE RAPE ISSUES

Date rape cases are difficult to prove. In *Re Winship*, 397 U.S. 358 (1970), the Supreme Court formally ruled that the Constitution's Due-Process Clause required the reasonable doubt standard because it provided concrete substance for the presumption of innocence. Even if the jury tends to believe Jane's account, its verdict still must be not guilty unless the evidence at the trial could have persuaded a "reasonable juror" that Joe is guilty "beyond a reasonable doubt."

The law makes it harder to convict Joe of a crime than to win a civil lawsuit against him because the stakes are higher in a criminal case. Whereas a defendant who loses a civil lawsuit is typically ordered to pay the plaintiff a sum of money, a criminal defendant often faces a jail sentence in addition to the other serious consequences that result from having a criminal record. Therefore, the Fifth and Fourteenth Amendment's admonishment that "no person may be deprived of life, liberty or property" without due process of law has been interpreted to require the "beyond-a-reasonable-doubt" standard. These and other protections for criminal defendants have led courts to conclude that, under our Constitution, it is better to risk allowing some guilty persons to escape punishment than to risk convicting an innocent person.

Limits on Lawyers

Although the First Amendment generally protects the media's publication of truthful information, lawyers agree to abide by numerous ethical rules to guarantee that criminal defendants will have an impartial trial. Some of these agreements limit lawyer's First Amendment rights. As Justice Kennedy wrote in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), "interpreted in a proper and narrow manner, for instance, to prevent an attorney of record from releasing information of grave prejudice on the eve of jury selection," the state may enforce an ethics rule to bar an attorney from making a statement to the press that will have a "substantial likelihood of materially prejudicing" a trial.

Impartial Jurors and *Voir Dire*

Jurors are selected through a process called *voir dire* (vwahr-deer), where lawyers (and/or the judge) question a large pool of prospective jurors about their backgrounds and biases. Each side has the opportunity to object to the selection of any juror they think will be prejudiced against them. The court might agree to move the trial to another county if the potential jurors there will be less affected by the pretrial publicity. Once a jury is selected, the court will instruct the jurors to disregard any evidence they may have heard outside the courtroom, and, in some rare instances, it might even decide to *sequester*, or isolate, the jury in a hotel and forbid them from reading the newspapers or listening to TV news.

The law's concern is that the jury should not be permitted to convict the accused of anything other than the present charge. Evidence of the accused's prior behavior might be allowed if the judge is satisfied that it

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establishes a "pattern and practice," but the judge also might determine that the prejudice the testimony would create in the jurors' minds outweighs its relevance in the case and rules against its use.

Why Rape Shield Laws?

Rape shield laws have been adopted in nearly all 50 states and by the federal government. These rules, which apply only in criminal cases, set out when and under what circumstances evidence of a rape victim's prior sexual behavior can be admitted during a trial. Before these laws were enacted, this evidence was admitted to reflect a lack of chastity in the victim from which the jury could infer consent to the alleged rape. (*Chastity* is defined as a woman's abstention from premarital or extramarital sexual intercourse.) It was assumed that a woman who "once departed from the paths of virtue is far more apt to consent to another lapse." Defense counsel often presented embarrassing, intimate details about the victim's private life that rarely had anything to do with the rape charge. This character assassination caused rape victims great humiliation and discouraged reporting of rapes. Many state legislatures have concluded that a rape victim is more likely to press charges if she knows her attacker will be unable to force her to discuss her sex life in open court. As Justice O'Connor noted in her opinion in *Michigan v. Lucas*, 500 U.S. 145 (1991), such statutes "represent a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy."

Rape shield laws must comply with the U.S. Constitution. The danger they pose is that they will prevent defendants from adequately cross-examining the victims to attack their credibility, thus violating the defendants' right to confront the witnesses against them, guaranteed by the Sixth and Fourteenth Amendments. Rape shield laws have also come under attack in recent years because courts have been inconsistent when defining situations as exceptions to the law in which a defendant can introduce evidence regarding the alleged victim's sexual history.

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Two Accused: Chronicle of a Rape Trial

PROGRAM THREE

WHILE VIEWING THE PROGRAM

What's Your Opinion on These Rape Issues?

This survey will give you an opportunity to express your opinions about many legal issues involving date rape. Don't answer based on your understanding of what the law is, but rather on how you feel it should be. All opinions are valid so long as you can give reasons for them.

Circle *A* if you agree with the statement, *U* if you are undecided, and *D* if you disagree. Do not sign your name. Your teacher will give you further instructions.

A U D **1.** The courts treat rape victims, especially victims of date rape, so unfairly that the victims should not report the rape to the police or bring criminal charges against the rapist in court.

A U D **2.** Bringing criminal charges against date rapists will decrease the number of date rapes that occur.

A U D **3.** If Judy encourages Ramon to have sex with her up to the point of sexual penetration and then says no, Ramon is guilty of rape if he then forces her to have sex.

A U D **4.** Sherman is charged with date rape, and the issue is whether Martha consented. If two other women tell the prosecutor that they had similar experiences with Sherman, this evidence should be admissible in court.

A U D **5.** If Jake is charged with rape, his attorney should have the right to tell the jury that the alleged rape victim has had many "one night stands" with different men.

A U D **6.** The media should print rape victims' names so that rape will begin to be treated like all the other crimes against individuals.

A U D **7.** If Nate is charged with rape, and the issue is whether or not Diane consented, it is not relevant that Diane had sex with Nate before.

A U D **8.** It is unfair of the media to print the name of an alleged rapist when there has not yet been a conviction.

A U D **9.** Women won't bring cases of rape if they know their names will be printed in the newspaper.

A U D **10.** When famous people are charged with rape, it is impossible to get a fair trial because all the potential jurors will have heard about it in the media.

A U D **11.** Miller is being prosecuted for raping Ann. Two years before this case, Ann brought a false rape charge against another man. The jury should hear about this prior false charge.

A U D **12.** Because truth is so difficult to determine in rape cases, and the issues are so personal, these trials should be closed to the public.

A U D **13.** A rape victim should have the right to let the jury know that an alleged rapist has prior rape convictions.

A U D **14.** A defendant should have the right to let the jury know that the alleged rape victim is a prostitute.

Tabulation of Survey Results

Statement	Agree	Undecided	Disagree
1			
2			
3			
4			
5			
6			
7			
8			
9			
10			
11			
12			
13			
14			

Two Accused: Chronicle of a Rape Trial

PROGRAM THREE

Legislative Worksheet

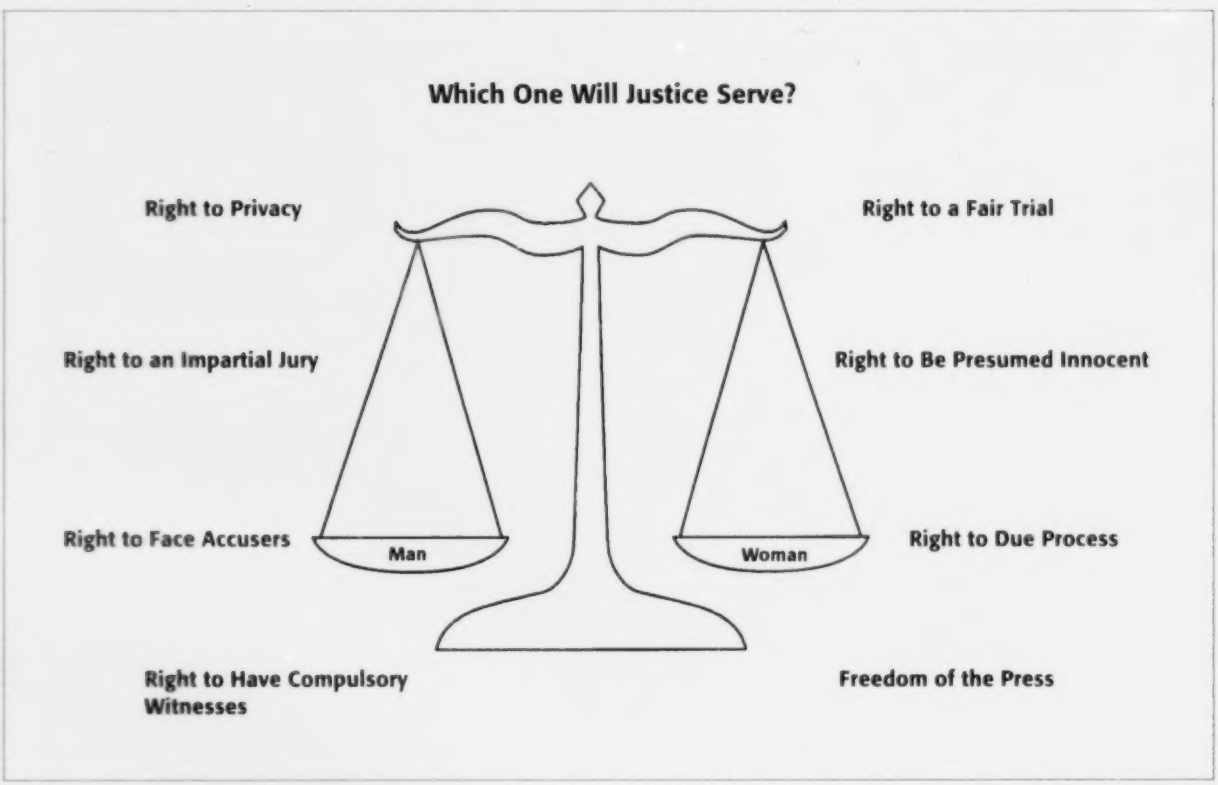
The following hypothetical rape shield law is modeled on existing statutes. Assume that the law has been enacted in your state five years ago. Since that time, a number of court cases have applied it. Several legislators wish to amend the law because they are concerned that the law may not be fair. In small groups, decide how, if at all, you will change the law. Your teacher will explain how to present your work to the class.

Rape Shield Law

The intent of the legislature in adopting this law is to (1) protect the privacy of rape victims and (2) provide constitutionally fair and effective prosecution of sexual offenses.

Section One: In a criminal case in which a person is accused of rape, evidence of the past sexual behavior of an alleged victim is not admissible, except when the past sexual behavior is with the accused and the accused is claiming that the victim consented to the act.

Section Two: Past sexual behavior means any sexual conduct that took place before the alleged rape.



AFTER VIEWING THE PROGRAM

Assign any of the following extension activities to your classes or to individual students.

Discussion

1. Have students select a student panel to discuss issues of the class's choice from the opinion survey. Each class member will serve on a panel member's team, contributing information from program notes to be used in the panel member's arguments. Topics can include the fairness of the criminal justice process in these cases, the inadmissibility of various kinds of evidence and the relevance of prior sexual conduct of an alleged rape victim, the issue of public trials for rape cases, and the likelihood that the presumption of innocence results in fair trials in date rape cases.

2. Give the students the opportunity to examine and revise the hypothetical rape shield law on page 27. The students should work in small groups of no more than five. Each group should write its revised statute on butcher-block paper or shelf paper for display in the classroom.

Examples of possible revisions of the hypothetical law include making the definition of prior sexual behavior refer only to physical acts of sexual contact and not to include verbal allegations describing a sex act; permitting to allow in evidence prior demonstrably false charges of rape; or repealing the statute in full and permitting judges on a case-by-case basis to decide what evidence is relevant. After each group reports on what it decided, one student from each will join a committee to draft a compromise statute for distribution to the class.

Essays

Ask students to write an essay about how to achieve a balance between rights and freedoms in cases of date rape. Limit the students to only two conflicting rights, between the defendant and the alleged victim, or between either of them and a third party, such as the press. The figure on page 27 will help the students organize their thoughts. Here are some examples of rights and freedoms their essays might compare and discuss.

- Alleged victim's right to privacy versus freedom of the press
- Freedom of speech and the press versus the right to a fair trial
- Right to privacy versus right to have compulsory witnesses
- Freedom of the press versus the right to be presumed innocent

Research

Since each state defines crimes through its own legislature, the definitions (and names) of date rape vary by state. Find out what your state laws are regarding date rape.

A Related Case

The Florida Star v. B. J. F., 491 U.S. 524 (1989)

A Florida newspaper ran a factually accurate story about a rape, based on properly obtained information from the county sheriff's department. In violation of a state statute, the story mentioned the name of the victim. The Court held that, under the First Amendment's free press guarantee, the newspaper was not liable for damages to the victim as the information was truthful and "lawfully obtained." The Court sought to limit the scope of its decision, emphasizing the particular facts of this case in its ruling.

BEFORE VIEWING THE PROGRAM

Discrimination and its effects and remedies are highly controversial, sensitive, and even emotional topics for many people. As in earlier lessons, help your students continue to develop their ability to discuss such issues by reviewing the two student challenges "Learning to Analyze Perspectives Unemotionally" and "Learning to 'Think as Argument,'" which are presented in the introduction. Use the challenges to help foster an atmosphere in which your students are willing to explore the reasons given for the positions they take in the activities.

Early Orientation

Photocopy pages 30–35 for students, and assign pages 30–34 as reading. Then conduct or have students lead any of the following activities.

A Few Days Before

1. Review the special terms on page 31 to ensure that students have mastered the vocabulary, ideas, and issues needed to understand these activities and the program.

2. Have the students use information under "Landmark Affirmative Action Cases" on page 34 to put together a list of legal parameters under which affirmative action plans have been allowed.

3. Either version of this activity can be done before or after viewing the film. Invite an equal employment opportunity or human resources officer who has participated in drafting or implementing an affirmative action plan to speak to the class about affirmative action. The person should explain the different standards of proof necessary when a discrimination claim is based upon a constitutional claim as opposed to a statutory claim (e.g., the Fourteenth Amendment Equal Protection Clause vs. Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991). An alternative to this activity is to have students research and identify affirmative action plans in your community and interview officers involved in drafting or implementing them. Later, the students will report the interviews to the class as news stories.

4. Ask groups of students to imagine that they are new congressional members who have accepted the challenge of ensuring racial equality in their society beginning this year. Have each group create an affirmative action agenda for their congressional session, naming and describing the programs they will propose. Have students word-process and publish their agendas for their student "constituents" to evaluate.

Two or Three Days Before

5. "Discrimination" isn't always a nasty word. Ask students to observe the relationships of people around them—friends, family, and strangers—and identify several examples of when people are given an advantage or preferential treatment of some sort. For example, a ten-year-old might give a five-year-old a head start in a footrace; veterans can get certain school and mortgage loans from the government while others cannot; the elderly are shown special courtesies, such as being given seats on the bus; and short people get to stand in front in group pictures. On an item-by-item basis, have the students decide whether these advantages are unfair to those who don't have them, and explain why. How is each situation similar to or unlike racial and other types of discrimination?

6. Use the survey "What's Your Opinion?" on page 35 to focus student attention on issues related to the subtleties of racial bias and the way we sometimes see our world in racial terms. The survey should be anonymous, and you should tally the results yourself. When you report the survey results, ask questions such as: How often are our opinions and decisions influenced by racial stereotypes? By prejudice? How colorblind is our society? If appropriate, to discuss their views, have students break into smaller groups that will offer encouragement to students who are trying to develop their skills in analyzing things unemotionally and in thinking as argument.

Day of the Program

Since your students will need to refer to pages 30–35 during the program, have some extra copies on hand. Review with them the worksheet on page 35. Assign them all the questions, or let them select ones they are most interested in. Have the students take notes on them while they view the video, and later either submit their written answers or gather in small groups to discuss what the answers might be.

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Equality and the Individual

PROGRAM FOUR

OVERVIEW OF THE PROGRAM

In *Equality and the Individual,* program participants struggle with the question of the extent to which the civil rights laws and constitutional provisions that were designed to end racial discrimination against minorities should limit modern race-conscious goals or quotas designed to benefit them. This debate over so-called "reverse discrimination" begins when moderator Charles Ogletree, Jr., of the Harvard Law School tells his panel of judges, journalists, academics, and school administrators that, in a town called Pacifica, five white police officers have apprehended the wrong man—an African American—and severely beaten him. The mayor's office is facing accusations not only of police brutality but of racial discrimination. African Americans, who represent 35 percent of the city's population, represent only 10 percent of its police force.

Though diverse and conflicting opinions emerge, it is apparent that panel members agree that America must move toward a society where a person is evaluated on individual abilities without regard to color, gender, religion, sex, or any other discriminatory factor. This program reveals, however, that we have yet to reach a consensus on the means through which to achieve this goal, and that resolving difficult issues like the ones involved here takes extraordinary skill and profound wisdom.

Part 1 (2:30): When Affirmative Action?

This 8-minute segment begins when moderator Ogletree says, "We're in the tranquil community of Pacifica." Panelists discuss whether affirmative action is needed and proper to remedy the police force's disproportionate African-American and white representation. Affirmative action is the policy of using racial or gender classifications to overcome or compensate for the continuing effects of previous discriminatory practices. The issue for some panelists turns on whether discrimination is the cause of the disparity. For others, affirmative action is appropriate no matter the absence of proven discrimination, to help in the effort to bring our society closer to the Fourteenth Amendment's vision of equal protection for all.

Part 2 (10:30): When Fourteenth Amendment Protection?

This 7.5-minute section begins when moderator Ogletree announces, "The mayor's done a good job of making some hirings." There's one position left, with two applicants: a white with a higher physical score, and an African American who is in all other respects equally qualified, with the plus of being black. Panel members struggle with the question of which two candidates the mayor should hire. Some argue that hiring the African American would constitute reverse discrimination in violation of the Fourteenth Amendment; others, that hiring the African American is justified to compensate for historical discrimination; still others argue that history can be ignored—there's enough in the present to justify hiring the African American.

Part 3 (18:00): Quotas and Equal Protection Claims

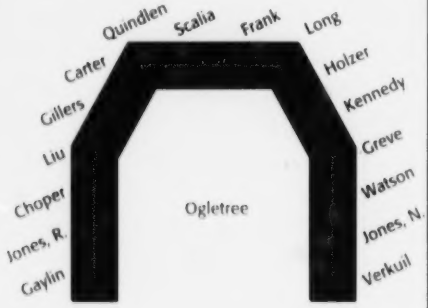
This 29-minute segment, the longest in the program, begins when moderator Ogletree says, "Professor Carter, Professor Kennedy, you are on the admissions committee at the Gateway University, a public institution in Pacifica which doesn't have a terrific policy in recruiting minorities: 90 percent white, 10 percent black." Should African-American applicants be favored? Should minority quotas be established? There's been no accusation, no conviction, of discrimination. As Justice Scalia asks, however, is color consciousness necessary to get to a colorblind state? Panelists confront this issue as they consider the selection of an African-American applicant over an Asian American and a white, when all three have identical qualifications. While the white applicant considers seeking legal redress for violation of his Fourteenth Amendment rights, the African American finds that, after classes start, his knowledge and skills are as yet insufficient to perform up to Gateway's standards. He will have no advantage in grading at Gateway.

Part 4 (47:00): An Exclusive School for African-American Males?

This 8.5-minute segment begins when moderator Ogletree says to Dr. Watson, "You're in Pacifica; you've been reading the paper about Gateway University. Where do we start to correct this problem?" Dr. Watson proposes to establish an exclusive school for African-American males based on empirical evidence that this type of intervention will increase their attendance and academic achievement. A special Afro-centered curriculum will be offered, and there will be increased in-service teaching and counseling. Panelists consider whether the exclusive school would violate the rights of other groups, with

the focus on the rights of African-American females.

Justice Scalia ends the program by reminding viewers that our nation probably has more racial problems than most countries do, but it is also more open and frank about them and every other problem. People like the panelists are arguing about means, not ends, which are in the Bill of Rights and the Fourteenth Amendment; all are shooting for individual treatment based on merit.



Special Terms

affirmative action
de facto
de jure
discriminatory practices
disparate impact cases
equal employment opportunities
Equal Protection Clause
gender/race classifications
invidious discrimination
Jim Crow laws
legal parameters
prejudice
race-conscious goals
racial quotas
reverse discrimination
separate-but-equal rule

Jim Crow Laws

Jim Crow refers to practices, institutions, and statutes that result from or foster segregation of African Americans from white Americans. The term comes from an African-American character in a popular song from the 1830s, and it came into common use in the 1880s when racial segregation became legal in many parts of the South.

First developed in the northern states and later adopted by the South, *Jim Crow laws* refers to statutes that required racial separation in many public places. These included public schools; recreational, sleeping, and eating facilities; public vehicles; even telephone booths. Jim Crow laws deprived African Americans of their voting rights. A series of Supreme Court decisions, such as *Plessy v. Ferguson,* 163 U.S. 537 (1896), fostered use of the separate-but-equal rule in the South and the rapid spread of *de jure* (officially sanctioned, lawful) segregation.

BACKGROUND ON DISCRIMINATION AND ITS REMEDIES

Racial goals and quotas are intended to diversify predominantly white institutions and professions and to compensate minority groups for having been disadvantaged by the continuing vestiges of discrimination. Proponents point to our country's history of slavery and government-sponsored racial discrimination and contend that *de facto* (existing, whether lawful or not) discrimination remains to this day in the form of, among other things, inferior schools for racial minorities, private clubs for whites, and unequal access to good jobs in high-paying professions, resulting in a lack of role models for minority children.

On the other hand, opponents point to the text of the Equal Protection Clause of the Fourteenth Amendment, which provides that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." It is impossible, they argue, to advantage one individual on the basis of race without disadvantaging others who are not members of that race, which the Equal Protection Clause flatly forbids. Critics of race-conscious goals and quotas argue not only that they are unconstitutional, but that, to the extent that they reinforce and codify racial classifications, they put off, rather than hasten, the achievement of true racial equality.

Plessy v. Ferguson: Separate but Equal?

The Equal Protection Clause, as direct and simple as it may seem, has been at the center of controversy almost from the moment it was added to the Constitution in 1868, in the wake of the Civil War and shortly after the Thirteenth Amendment abolished slavery. For example, did the Equal Protection Clause prohibit Louisiana from making it a crime for an African-American passenger to sit in a "Whites Only" railroad car? Asked that question in *Plessy v. Ferguson,* 163 U.S. 537 (1896), the Court said that the clause "could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either." Just as the states and the U.S. Congress (for the District of Columbia school system) required separate schools for "colored" and white children, Louisiana simply required the separation of the two races in public conveyances. True, African Americans could not sit in the white cars, but

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whites could not sit in the "colored" cars either. There was nothing unequal about that, according to the Court.

Influential Dissent

Justice Harlan, the lone dissenter in *Plessy,* objected that "everyone knows that the statute in question had its origin in the purpose not so much to exclude white persons from railroad cars occupied by blacks as to exclude colored people from coaches occupied or assigned to white persons." He thought the law violated the Equal Protection Clause. "There is in this country," he wrote, "no superior dominant ruling class of citizens. There is no caste here. Our Constitution is colorblind, and neither knows nor tolerates classes among citizens."

***Brown* and School Desegregation**

Resonating Justice Harlan's dissent, a string of cases were to find that educational facilities for African Americans were not equal in a physical sense. In *Brown v. Board of Education,* 347 U.S. 483 (1954), a unanimous Court cited psychological studies to determine that "the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. . . . We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." While the reasoning of the Court in this case is no longer accepted, it was a landmark in the school desegregation effort.

Quota System Struck Down: *Bakke*

But what of the other aspect of Justice Harlan's dissent in *Plessy*—the notion of a "colorblind" Constitution? While many people do endorse that view of the Equal Protection Clause, many others—both African American and white—do not. It is this disagreement that underlies the debate over "reverse discrimination," an argument that came to a head in the case of *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978), and in cases that followed.

The Medical School of the University of California at Davis argued that the Equal Protection Clause does not literally accord individual white and African-American persons equal protection from racial discrimination, but rather that it only renders official racial discrimination constitutionally suspect if it involves discrimination by the white majority against the African-American minority. Racial discrimination is not constitutionally suspect, the university argued, if its purpose is "benign"—that is, if the discrimination is designed to benefit rather than to disadvantage members of an historically victimized group. Based on that understanding of the Constitution, the University set aside 16 of its 100 admissions seats for minority applicants. Under this policy, minorities could compete for 100 seats, while white applicants could compete for 84 seats.

Alan Bakke was not admitted to the "white" seats, although his grade-point average and Medical College Admission Test scores were higher than the average of regular admittees; both were much higher than those of the 16 minority admittees. He applied for admission twice, and the school rejected him twice. He filed suit, alleging that the university's admission policy violated his constitutional right to equal protection by discriminating against him on the basis of his race: the university would have accepted him if he had been African American and rejected him solely because he was white. The Court, stressing that the Fourteenth Amendment guarantees equal protection to all "persons," African American or white, struck down the medical school's admission policy and ordered the university to admit Bakke. It disagreed, however, with his contention that university admission decisions must be made without regard to the racial or ethnic background of the prospective student.

First, the Court said, although the Constitution does not permit the school to employ a rigid quota system that sets aside seats that whites may not compete for solely because of their race, the University is entitled to consider that "low grades and test scores may not accurately reflect the abilities of some disadvantaged students; and it may reasonably conclude that although their academic scores are lower, their potential for success in the school and the profession is equal to or greater than that of an applicant with higher grades who has not been similarly handicapped." A minority applicant's race, in other words, can be a positive factor in admissions decisions—it just cannot be the only factor.

Second, the Court said that, if an employer or institution can show that it had discriminated against minority applicants in the past, and that preferential treatment of minority applicants in the present is "necessary to grant them the opportunity for equality which would have been theirs but for the past discriminatory conduct," a quota system such as the one at issue in *Bakke* might be upheld.

The typical affirmative action plan merely treats membership in a racial minority as a plus when weighing the qualifications of competing candidates. By contrast, in *City of Richmond v. Croson,* 488 U.S. 469 (1989), the Court emphasized that racial quotas must be carefully chosen to address only the effects of proven racial discrimination by the very institution that now seeks to increase minority participation. One thing is clear—the last word has not been spoken on how quotas can or should be used to redress discrimination.

Affirmative Action—Advantages?
From a policy standpoint, what are some of the advantages of employing affirmative action in hiring and admissions decisions? Is seeking a diverse work force or student body a good in itself? If a medical school decides to admit a greater number of African Americans, who then go on to practice medicine successfully, might those doctors serve as role models for minority youth who otherwise might not have ever seen or talked to an African-American doctor? Might the doctors be likely or willing to provide health care services in underserved areas? Would affirmative action tend to compensate minorities for having been economically and educationally disadvantaged as compared to the typical member of the white majority?

. . . And Disadvantages?
What are some of the disadvantages of affirmative action? Does it tend to create ill will on the part of the white majority, many of whom never engaged in any discriminatory acts themselves? Could such a policy detract from the accomplishments of those who benefit from it? Could affirmative action be leading us away from a colorblind society in which each individual is judged according to personal abilities and accomplishments? Is it fair to "punish" a white male job applicant who is qualified for and perhaps desperately needs a job in order to benefit a minority applicant who may be in better circumstances? How will these questions be decided, and is it the courts, legislatures, or other institutions that should make such decisions?

Civil Rights Act of 1991

Winning job discrimination lawsuits became easier for workers under the Civil Rights Act of 1991. This law requires that, if an employer's hiring or promotion practices and standards, such as strength or competency tests, seem fair but result in discrimination, the employer must prove that they are necessary to operate the business. In cases of intentional job discrimination based on sex, religion, national origin, or disability, it further gives the right to sue for compensatory and punitive money damages in addition to, or in lieu of, back pay and lost benefits. Before this act was passed, only racial discrimination victims could be awarded these additional damages. The act also provides for a jury trial at the demand of either party when charges are sought. Before this act, a judge decided job discrimination cases.

Landmark Affirmative Action Cases

University of California Regents v. Bakke, 438 U.S. 265 (1978). The Supreme Court struck down a medical school's admission policy that set aside a specific number of places for minority applicants because the Court held that the university had used race as the sole criterion for determining who was admitted under its affirmative action plan. The Court held that the university could use race as one of the factors (but not the only factor) in the admissions decision to promote student diversity.

United Steelworkers v. Weber, 443 U.S. 193 (1979). The Supreme Court approved a voluntary plan between the labor union and the employer that, in order to correct an existing racial imbalance in craft jobs, provided for the selection of one African American for every white chosen for a special training program.

Johnson v. Transportation Agency of Santa Clara, 480 U.S. 616 (1987). The Supreme Court upheld the Santa Clara County Transportation Agency's voluntary affirmative action plan adopted to redress the underrepresentation of women in certain skilled job classifications. The Court held that the promotion of a white female to road dispatcher over a white male who had a slightly higher score in a competitive interview did not amount to reverse discrimination.

Richmond v. Croson Company, 488 U.S. 469 (1989). The Supreme Court ruled that the city of Richmond's set-aside program for minority contractors violated the Fourteenth Amendment's Equal Protection Clause because there was no showing that the city had engaged in discriminatory practices in the awarding of such contracts, and thus the program constituted a quota rather than a goal.

Susan Wise

Equality and the Individual

PROGRAM FOUR

What's Your Opinion?

Directions: Each of the following statements deals with an issue of discrimination and will help you determine to what extent you take race into account when making decisions. For each item, Circle A for agree, U for undecided, and D for disagree.

A U D **1.** Private clubs and other exclusive groups don't need to be concerned about having racial minorities as members.

A U D **2.** You have applied for a job where 90 percent of the employees are members of your race. The interviewer is not. You become a victim of discrimination when the interviewer hires someone of her own race instead of you.

A U D **3.** Lack of trust will keep police forces of greatly mixed racial representation from working as effective units.

A U D **4.** It doesn't matter if a school has discriminatory practices if minorities never apply there anyway.

A U D **5.** If the government didn't force integration, it would never happen because people prefer to be with their own kind.

A U D **6.** You have been admitted to a medical school that has an affirmative action program. The first day of class a person of another race sits next to you. You can assume that the person is not so qualified as you are.

A U D **7.** Racism is no longer a problem in the United States if people of color work hard and apply themselves.

A U D **8.** Government intervention has only worsened bigotry in our society.

WHILE VIEWING THE PROGRAM

Directions: This program debates the use of affirmative action programs as legitimate responses to discrimination both in the work place and in educational settings. As you watch the program, think about these questions, following your teacher's instructions. Your teacher will tell you how to complete this activity at the end of the program.

1. What is affirmative action?
2. What constitutional provision(s) is/are relevant in determining the judicial response to racial discrimination?
3. What difference does it make if the discrimination is de jure or *de facto?*
4. What trade-offs must sometimes be made when affirmative action programs aid in the selection of applicants for jobs or opportunities in higher education? Are these trade-offs justified? Why or why not?
5. During the program, Professor Carter was asked to explain to a white applicant why the applicant was denied admission to Gateway University when a minority student under an affirmative action plan was accepted. Professor Carter stated, "Like all Americans . . . white Americans must learn—as did black people—to share the burden of allocating limited resources." What do you believe was Professor Carter's point? How have African Americans in the past borne such a burden? Do they still, along with other people of color? Can the ill effects of past discrimination be eradicated without some unfairness tolerated?
6. What is the rationale for establishing an all-male, predominantly African-American public school in Detroit? Who may be disadvantaged by the establishment of such schools? Do all-male schools for African Americans involve the same kind of invidious discrimination found unlawful in the segregated schools established under Jim Crow laws?
7. Should institutions be allowed to move to a racially selective policy for the purpose of increasing minority participation without a showing of past discrimination? How helpful is the Bill of Rights (and other constitutional provisions) in resolving this issue?

AFTER VIEWING THE PROGRAM

1. Divide students into groups of three to role-play hypotheticals of their design, or to use the ones below. Allow each student to choose one of the following roles: mayor or admissions director, and accepted applicant or rejected applicant for a job or college admission. The rejected applicant is disputing the decision and wants it reversed. Both sides should present their positions based on the facts, with the denied applicant speaking first. The mayor or admissions director may ask questions before rendering a final decision and stating reasons for it. After, the class will have an oral vote on whether they agree with the decision. Note that the students will have to flesh out each hypothetical situation, determining which is the disputing applicant.

a. At Gateway University, a four-year public institution of higher education, the incoming freshman class has been filled except for one seat. The director of admissions has applications from three equally qualified students. Their grade-point averages, performances on the SAT, extracurricular activities, and letters of recommendation are indistinguishable. One student is white, one is Asian American, and one is African American. Gateway's student body presently is 84 percent white, 12 percent Asian American, and 4 percent African American. It has no history of discriminatory admissions practices. Which applicant does the admissions director choose?

b. The City of Pacifica has just instituted an affirmative action plan to increase the number of African Americans on its police force, which is 90 percent white, 8 percent African American, and 2 percent other. This is a voluntary plan entered into to compensate for previous racial bias in the selection and promotion of whites over African Americans. The chief of police resigns in protest. Several candidates apply for the position. The applicant pool is finally narrowed to one white and one African American. Their qualifications are comparable except that the white applicant scores two points higher on a physical exam. The city of Pacifica has a 35 percent African American population. The mayor of Pacifica has the authority to appoint the chief. Whom does she choose?

2. If possible, make available to one of your students *Garrett v. Board of Education of the School District of the City of Detroit,* 775 F.Supp. 1004 (E.D.Mich. 1991). Have others research the editorials listed and other newspaper editorials about whether all-male, predominantly African-American schools should be established. The first student should share quotes from the case with the class, and the others should provide summaries of the editorials' arguments. Have groups examine any of the editorials and outline arguments for or against the position taken that would represent the interests of one of these organizations: the American Civil Liberties Union (ACLU), the National Organization of Women (NOW), African-American Men in Unity, and the School District of the City of Detroit (where one such academy is established). Each group should compile its collective arguments into a position paper to share with the class.
Goodman, Ellen. *Washington Post,* 7 September 7, 1991: A21.
"Review and Outlook Editorial." *Wall Street Journal,* 11 Nov. 1991: A12.
African American Enterprise, February 1991: 18

3. During the discussion regarding a white applicant's inability to accept his denial of admission to Gateway University, Rhodes Scholar Goodwin Liu stated: "There is no dean of admissions in this country who would ever admit that if they had the same pool of applicants [from which] to pick admittees twice, that they would pick the exact same persons." Have students write an essay explaining what this suggests about the admissions process and whether it gives a legitimate claim of unfairness to any one of the students denied admission in scenario 1.b. above.

PROGRAM FIVE Criminal Justice: From Murder to Execution

BEFORE VIEWING THE PROGRAM

There are many complex issues to consider when examining our criminal justice system. Use any of the following activities to help your students prepare for and benefit most from the video program.

Early Orientation

1. A few days before your class views the program, provide each student with a photocopy of pages 38–44. Assign pages 38–42 for reading, perhaps in sections.

2. All the legal terms listed on page 39 are used in the text, and many of them are defined there. Ask some students to locate where the words are used, fashion definitions for them, and post the definitions for the class's use.

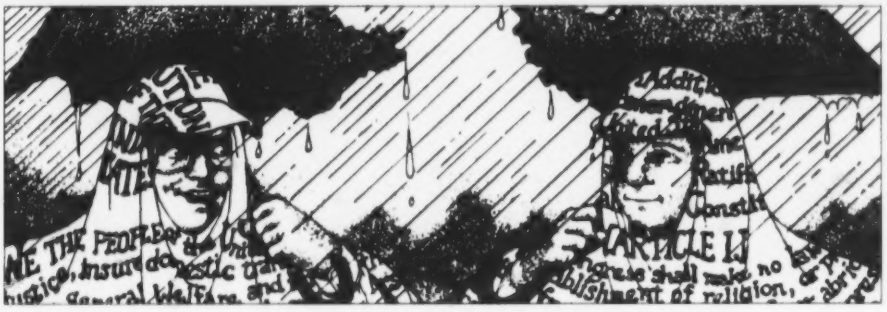
3. Stress that students should become familiar with the sequence of events in the investigation, prosecution, and sentencing of a murder case suspect. They should also be able to list basic legal rights that may be implicated in the various stages of a murder case. These are organized in tables on page 39. Discuss the tables as a class, explaining any concepts or terms that give the students difficulty.

Two or Three Days Before

For these activities, furnish each student with a photocopy of page 44. Have groups of two or three students follow the illustration on page 44 to construct a constitutional amendment ladder using the fourteen principal constitutional rights. At the same time, ask other students in groups of the same size to imagine that space invaders have taken control of the government and are limiting the number of criminal justice rights to five. Ask them which five rights they would keep and why. In both versions, the groups will make presentations to the class where they will show that they understand the nature of each right, the scope of its protection, and the consequences if it was lost.

Day of Program

Review the worksheet on page 43 with students. Make sure that they understand how to fill it out. The worksheet should help students begin to identify and discuss factual issues and connect them with constitutional rights. Remind them not to write in their conclusion until after the program ends.



Susan Wise

Criminal Justice: From Murder to Execution

PROGRAM FIVE

OVERVIEW OF THE PROGRAM

In *Criminal Justice: From Murder to Execution*, John Ford leads a distinguished panel through the developments in a hypothetical murder case—from the discovery that 7-year-old Becky Carson has been sexually assaulted and brutally murdered, to the ensuing investigation, arrest, trial, and sentencing of Frank, one of two suspected school custodians.

At each stage of the hypothetical, the panelists examine the inherent polarity between society's need, on the one hand, for protecting individuals against undue governmental intrusion and, on the other, for society's collective security through the government's diligent prosecution of criminals. At different times in our history, the courts have moved closer to one pole, then to the other. They have also adopted hybrid or compromise positions based on balancing the two interests.

Part 1 (2:00): Illegal Search
This 13.5-minute part begins when moderator Ford says to the panel, "There's been a murder." When investigators go to question school custodians Frank and Hector about Becky Carson's death, they suspect that there is evidence of the crime in a gym bag on the floor. They have no search warrant, and, under the Fourth Amendment, which protects against unreasonable search and seizure, they haven't enough cause to search the bag but instead are allowed only to observe what is in plain sight. When one officer nudges the bag open an inch or two, he sees a doll that he suspects to be Becky's. Although the bag may be taken into custody, it may not be used as evidence in court because it was "unreasonably searched."

Part 2 (15:30): *Miranda* Rights
This 9-minute segment begins when moderator Ford tells the panel that a woman has called the police saying, "My daughter goes to the same school that Becky went to—they were friends." Investigators' conversations with and observations of Becky's friend Alice strongly suggest that Frank and Hector should be brought in for questioning, but they are not yet under arrest. The officer recites their *Miranda* rights. While *Miranda v. Arizona*, 384 U.S. 436 (1966), limits the power of police to question subjects, and some panelists agree that Frank and Hector seem to have "more rights than the murdered child," others are persuaded of the need for *Miranda* in order to protect suspects, under the Fifth Amendment, from being forced to testify against themselves and to guarantee their right to counsel under the Sixth Amendment.

Part 3 (24:30): Legal Deceptions
This 7.5-minute segment starts when moderator Ford says to Investigator Donovan, "each time you ask him a question, Frank just sits very quietly and shakes his head, nothing. . . ." As part of the hypothetical, Donovan lies in order to force Frank to confess, telling him that Hector is giving him up and that "the evidence guys" have found Frank's semen in Becky's body. Frank, apparently on the verge of confessing, makes an incriminating statement. While some panelists object, saying that police today substitute more sophisticated psychological pressure for physical abuse to force confessions, the Supreme Court has allowed lying as a deceptive investigative technique. The Constitution doesn't protect gullibility, even though psychologically coerced suspects could confess to crimes they did not commit. Once in court, the police have to tell the truth about any lies they told, and their suspects' confessions will be admissible.

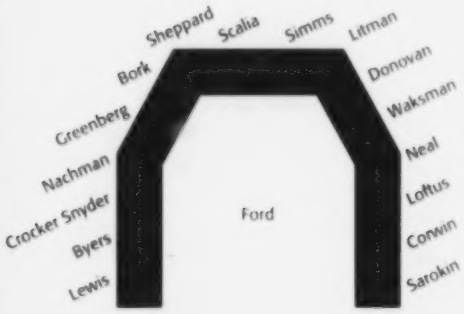
Part 4 (32:00): Defending Frank
This 9-minute segment begins when moderator Ford says to Mr. Neal, "[Frank's] been indicted now." Frank's counsel finds out what facts the prosecution has and instructs him not to talk to anyone unless counsel is present. This will protect Frank's Sixth Amendment right to counsel and prevent investigators from forcing more comments from him. As is customary, Frank's attorney has him select his own defense: he did nothing but hold Becky on his lap from time to time.

When Alice is questioned during the trial, she falters in her testimony and seems afraid to speak in Frank's presence. The judge has the option of having her testify via close-circuit TV, to which the defense strongly objects.

Part 5 (41:00): Sentencing Frank—A Death-qualified Jury?
This 10-minute segment begins when moderator Ford turns to Mr. Waksman and says, "Well, the jury has heard Alice testify." Frank is convicted; he will be sentenced in a separate proceeding. Panelists consider the consequences of "death-qualified juries": In order to ensure that the death penalty is possible, courts must disqualify any jurors who object to it. Panelists critical of this procedure say that it makes juries like Frank's death prone, and probably conviction prone.

Part 6 (51:00): Writ of Habeas Corpus

This 4-minute segment begins when moderator Ford says, "Well, that testimony has been allowed." Frank receives the death penalty. The defense's next step is to petition for a writ of habeas corpus if the defense can show that Frank was denied any of his federally protected constitutional rights in the course of the proceedings against him. If this writ is granted, he will be set free. The program concludes with panelists discussing controversies surrounding habeas corpus: the "Great Writ," and probably our most important guarantee against executive action, but one that has been used to free the guilty as well as the guiltless.



Murder Case Procedures

These are the basic legal procedures that take place in the investigation, prosecution, and sentencing of a murder case.

1. Search and seizure, including probable cause, search warrants, and the Exclusionary Rule
2. Interrogation and confession, including *Miranda* warnings and deceptive interrogation practices
3. *Voir dire* of the jury (see program 3)
4. First trial phase (adjudication of guilt)
5. Second trial phase (sentencing)
6. Appeal in state court
7. Federal habeas corpus review of state court proceedings, and its limitation

Rights in Murder Cases

These basic legal rights may be implicated in the investigation, prosecution, and sentencing of a murder case.

1. The Fourth Amendment right to be free from unreasonable searches and seizures
2. The Fifth Amendment right not to be compelled to testify against oneself
3. The Fifth and Fourteenth Amendment right to due process of law
4. Various Sixth Amendment rights, including the right to counsel, to jury, and to be confronted with adverse witnesses
5. The Eighth Amendment right not to be subjected to cruel and unusual punishment
6. The Article I right to a writ of habeas corpus

Special Terms

adjudication
adverse witness
aggravating factors
beyond a reasonable doubt
bifurcated trial
capital defendant
deceptive interrogation practices
double jeopardy
Exclusionary Rule
executive action
grand jury
habeas corpus
implicate
indictment
mere possession
mitigating circumstances
preliminary hearing
preponderance of the evidence
polarity
probable cause
proportionality review
reasonable articulable suspicion
search and seizure
search warrant
victim impact statements

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BACKGROUND FOR A MURDER CASE

Exclusionary Rule: A Deterrent to Police Misconduct?

The *Exclusionary Rule*, providing that the prosecution may not use evidence seized in violation of the Constitution or a statute, was fashioned in 1914 in the case of *Weeks v. United States*, 232 U.S. 383 (1914). This rule exemplifies the sometimes conflicting concerns about bringing criminals to justice and protecting the defendant's rights, based on a third concern—the Fourth Amendment right of all citizens to be free from unreasonable searches and seizures. The Supreme Court handed down the Exclusionary Rule because of its many cases of alleged police misconduct. The rule was designed to deter federal law enforcement officers from violating the Fourth Amendment and thus to protect individual's rights. The Exclusionary Rule was first applied to the states in the case of *Mapp v. Ohio*, 367 U.S. 643 (1961). It has also been extended to enforce the Fifth Amendment's protection against self-incrimination and the Sixth Amendment's right to counsel by barring use of statements taken in violation of those provisions.

A Question of Sanctions

The controversy is not so much over the Fourth Amendment's requirements as the Supreme Court's decision that if a police officer violates a suspect's rights in the course of a search and seizure, the prosecution is barred from using that evidence, no matter how crucial it may be or how heinous the crime. Although the rule in fact operates so as to allow a criminal to go free "because the constable has blundered," it is thought to operate as an effective deterrent to police misconduct. If the police know that the consequence of an illegal search and seizure is the loss of valuable evidence, they are likely to take great care to respect the Fourth Amendment. For example, all police officers in the program hypothetical know that their "hunch" did not amount to the probable cause necessary to search the suspect's gym bag.

As with the Exclusionary Rule, the *Miranda* debate is not so much over the rights guaranteed by the Bill of Rights as over the sanctions the Supreme Court has decided to impose for a police officer's violation of those rights. However, a confession can be used if, for example, the defendant chooses to testify in his or her own defense. In that case, a prior confession could be used to discredit the defendant's in-court testimony (*Oregon v. Haas*, 420 U.S. 714 [1975]). But, once again, the notion is that if the police know that any confessions they wrongfully obtain will be suppressed, they will take care to respect all defendants' Fifth Amendment rights. As the program shows, the police have in fact developed other interrogation techniques for obtaining confessions in a constitutional manner.

Is the Exclusionary Rule the only conceivable way of enforcing the Fourth Amendment? Is the Court's decision to require *Miranda* warnings the only conceivable way of enforcing the Fifth Amendment? What other approaches might the Court take? Why has the Court decided to "punish" the prosecution for police officers' or prosecutors' unlawfulness? Is there any validity to claims that some people confuse the criminal justice system's search for truth with a game in which it is somehow "unfair" to trick a guilty person? This program struggles with many of these questions, to which there are no simple answers.

TV Testimony

A recent Supreme Court ruling permits children to testify via closed-circuit television. In the hypothetical, when the trial court reasons that Becky's frightened friend Alice may testify via TV, the defense attorneys object. Why might this be so?

The Sixth Amendment, in addition to guaranteeing all criminal defendants the right to have an attorney represent them, provides that they have the right to be confronted with adverse witnesses. Frank's defense attorneys reason that Alice's credibility cannot be assessed unless she is forced to testify in front of Frank, and that, if the testimony is given on TV, the jury may not be able to see the gentle efforts the defense uses in questioning the young witness. As one panelist notes, these cases are extraordinarily difficult for both the defender and the defendant, who under no circumstances want to be viewed as intimidating the child.

Mapp v. Ohio,
367 U.S. 643 (1961)

Dollree Mapp lived in Cleveland, Ohio. Police arrived at her house and asked her if they could search for a fugitive they believed was hiding there. She would not let them in without a search warrant. The police waited until more officers arrived; then they broke down the front door. When Mapp asked to see a warrant, the police showed her a piece of paper that she could not read. She took the paper and put it in the front of her dress. The police held her down and removed the paper. They then handcuffed her and kept her in an upstairs bedroom while they searched.

The police found no fugitive, but they did find some obscene pictures in the bottom of a trunk in the basement. Mapp said they belonged to a former tenant who had left the trunk there. She was convicted of possession of obscene material and sentenced to up to seven years in prison. No warrant was produced at her trial. She finally won on appeal.

Miranda v. Arizona, 384 U.S. 436 (1966)

Scope

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court ruled that, unless suspects are told that they have certain rights, nothing that they say may be held against them at their trials. They have the right to remain silent, and they must be told that they may have an attorney present during all questioning, and that the court will appoint an attorney if they can't afford one. If the suspect requests an attorney, all questioning must cease until one arrives.

Later Supreme Court decisions have limited the scope of the *Miranda* ruling. For example, the Court ruled in 1971 that, to prove the defendant is lying, a confession obtained in violation of the *Miranda* ruling may be used at a trial.

Right Against Self-incrimination

Although in some ways narrower in scope than the Exclusionary Rule, the Court's 1966 decision in *Miranda v. Arizona* was as controversial as the one in *Mapp*. Whereas the Exclusionary Rule bars any evidence obtained in violation of the Constitution or a statute, *Miranda* excludes only statements obtained from a suspect while being questioned in police custody, and then only if the suspect hasn't been warned of the rights or, if warned, hasn't understood them. Like the Exclusionary Rule, the *Miranda* warnings do not appear in the Constitution but were fashioned by the Supreme Court to enforce an important constitutional provision—in this case, the Fifth Amendment, which says that no one may "be compelled in any criminal case to be a witness against himself." Because this right against self-incrimination is viewed as so basic, the Court has concluded that any waiver of it must be voluntary and "knowing," and that it is not a knowing waiver unless the suspect has heard and understood the *Miranda* warnings before deciding to talk to the police.

Bifurcated Trial

In order to guarantee capital defendants' Eight Amendment rights, limit the jury's arbitrary discretion in death penalty cases, and provide for consideration of defendants' character for sentencing, the Court requires states to conduct bifurcated trials, or trials with a separate sentencing hearing after a capital defendant's trial and conviction. The guilt phase excludes certain character and other possibly prejudicial information, while the sentencing phase allows the defendant's past to be considered. For instance, victim impact statements, showing the harm done to a victim's family or friends, are permissible in the sentencing phase.

Aggravating Factors

The prosecution bears the burden of proving beyond a reasonable doubt that the defendant whom it wishes to execute has committed or exhibited at least one aggravating factor that is listed in the state's death penalty statute. Typically, death penalty laws require the jury to specify one of these.

Death Penalty: Special Procedures

Even a convicted murderer retains some constitutional rights, and chief among these is the Eighth Amendment right to be free from "cruel and unusual punishments." The prosecution, and a number of program panelists, would give Frank the death penalty after his conviction; but because of the final and ultimate nature of this penalty, it is subject to protective procedures that other penalties are not. The Supreme Court in *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion), has said capital punishment must not be "cruelly inhumane or disproportionate to the crime involved." To avoid "the influence of undue passion or prejudice," the trial determining guilt must exclude certain evidence of the defendant's past that might prejudice the jury, and the jury must be instructed on any lesser included offense, or a less-serious crime provable by similar facts. In a case of murder, for example, manslaughter and involuntary manslaughter might be put forward.

In part because the Constitution elsewhere contemplates capital punishment as a permissible penalty, the Eighth Amendment's ban on cruel and unusual punishments was undoubtedly intended to ban the punishments that were thought to be cruel and unusual in 1791—namely, deliberate torture. Several Justices have believed that capital punishment is "cruel and unusual punishment" in every instance and, hence, unconstitutional. On the other hand, a majority of the Supreme Court has determined that the Constitution does permit executions for a limited category of murders.

In a number of cases, the Court has declared that the meaning of the prohibition of cruel and unusual punishment must be derived from the "evolving standards of decency that mark the progress of a maturing society." Can an argument be made that, although the death penalty was not cruel and unusual in 1791, it is today? Can another be made that, since the original meaning of the phrase is clear, the Supreme Court ought not to take upon itself to give the phrase new meanings based on its sense of our current "standards of decency"?

Aggravating factors include the seriousness of the crime or the incorrigibility of the defendant, shown perhaps by previous crimes of violence. The Court has held that the death penalty is not unconstitutional for persons sixteen years old at the time of the offense.

Mitigating Circumstances
The defense then may introduce an unlimited number of *mitigating circumstances*—reasons why the jury should be lenient. These might include a defendant's impoverished or abusive childhood circumstances or victim impact statements. The jury must balance these with the prosecution's presentation and may deliver a sentence of death only if the aggravating factors outweigh the mitigating circumstances.

State Appeals
Many states provide for automatic appeal to the highest state court, allowing judges to check for any influence of passion or prejudice, as well as to assure that the evidence supports the aggravating factors the jury specified, and that the sentence has been handed down in cases involving similar facts and circumstances (called "proportionality review").

Multiple Habeas Issue
After the defense has completed appeals through the state court system—and perhaps asked the Supreme Court to grant review—it may take death penalty cases, like other cases, to the federal courts through a writ of habeas corpus. For the federal courts to intervene in the state's criminal justice process, the defense must show that one of the defendant's constitutional rights was violated at trial.

In the past, prisoners have filed new writs alleging violations of other constitutional rights after their first or subsequent writ was denied, and the question arose as to how many opportunities a death-sentenced person should have to question the trial and sentencing. In order to limit the number of writs, today the defendant must include all claims in the first writ unless able to show good cause for not doing so.

Criminal Justice: From Murder to Execution

PROGRAM FIVE

WHILE VIEWING THE PROGRAM

Select one case fact from the program overview and trace the discussion about it throughout the program following the worksheet format below. Don't write in your conclusion until after the program is over.

Applying Constitutional Rights to Case Facts

Fact: Possible suspect's gym bag on floor in front of police could contain important evidence.

Issue: Should police search person's personal effects on hunch?

Right: 4th Amendment: person's effects secure from unreasonable search

Arguments for Searching:

- a serious crime has been committed
- could help prevent further harm by confirming suspicions
- could lead to other evidence that would be admissible
- will probably lose this evidence anyway if don't seize, illegally or otherwise

Arguments against Searching:

- person's effects are protected by the Constitution
- evidence would become inadmissible
- evidence may be only means to convict suspect
- police need more than a hunch; need probable cause to search bag
- respecting the Constitution is as important as this case

Conclusion: _____

_____

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Criminal Justice: From Murder to Execution

PROGRAM FIVE

Climbing the Amendment Ladder

Directions: Use the numbers from each of these fourteen principal constitutional amendment rights pertaining to the criminal process to rank the rights from most important to least important on the ladder's rungs.

1. right to obtain a writ of habeas corpus (Art. I, sec. 9, cl. 2)
2. right to freedom from unreasonable searches and seizures (4th Amend.)
3. right to presentment or indictment of a grand jury for serious crimes (5th Amend.)
4. right to freedom from double jeopardy (5th Amend.)
5. right not to be compelled to be a witness against oneself (5th Amend.)
6. right to due process of law (5th and 14th Amend.)
7. right to a speedy and public trial (6th Amend.)
8. right to an impartial jury in district where crime was committed (6th Amend.)
9. right to be informed of the nature and cause of the accusation (6th Amend.)
10. right to confront adverse witnesses (6th Amend.)
11. right to summon witnesses in one's favor (6th Amend.)
12. right to effective assistance of an attorney (6th Amend.)
13. right not to have excessive bail imposed (8th Amend.)
14. right to be free of cruel and unusual punishment (8th Amend.)

AFTER VIEWING THE PROGRAM

1. Have students extend the worksheet they filled out during the program by preparing a formal paper in which they state their conclusion as a proposition (e.g., "The police should be able to search a person's effects left in public on a hunch that the person committed a crime"). Next, the students should identify and submit arguments from the program, their reading, and their own reasoning for or against their proposition.

2. A summary of *Mapp v. Ohio*, 367 U.S. 643 (1961), appears on page 40. In an essay, have students assess the Exclusionary Rule in light of this case, in which the defendant was not engaged in the crime the police were investigating. Students might discuss these issues: (1) Should the obscene materials have been excluded from Mapp's trial? (If they had been excluded, there would have been no evidence to convict her.) (2) Could the police have gotten a search warrant? (3) Even with a warrant, did the search of the trunk go beyond looking for a fugitive? (4) On an emotional level, how does the *Mapp* case compare with the case in the hypothetical? (The key difference is that the former arouses our sympathy for the police and against the suspect, while the latter arouses our sympathy for the defendant and against the police.) What changes in the case might make you change each of the above answers?

3. As if your students were attorneys, ask them to prepare and present closing speeches by the prosecution or the defense against or for the teenager in this modification of the video's hypothetical. The youth is faced with a possible death penalty. Students may add any facts that do not conflict with what's stated here.

Joe, Frank's sixteen-year-old part-time assistant custodian, has also been convicted of Becky's murder. Jim has no previous record, but he was expelled from high school for truancy. His parents are dead, and his only living relative, a sister, is serving time for theft.

4. Have some students develop and debate reasons why the opportunities death-sentenced persons have to file writs of habeas corpus should or should not be limited.

EDUCATIONAL RESOURCES

LIFE AND CHOICE AFTER *ROE v. WADE*

Mohr, James C. *Abortion in America: The Origins and Evolution of National Policy, 1800–1900*. Oxford: Oxford University Press, 1978.

VanBurkleo, Sandra F. "The Right to Privacy." In *By and for the People: Constitutional Rights in American History*. Edited by Kermit L. Hall. Arlington Heights, Ill.: Harlan Davidson, 1991. 113–32.

THE FIRST AMENDMENT AND HATE SPEECH

"The Case for Hate." *Life* 14, no. 13 (Fall 1991): 60–66. (Special Bill of Rights issue)

Education for Freedom: Lessons on the First Amendment for Secondary School Students (6–12). Denver: First Amendment Congress, University of Colorado at Denver, 1991.

"First and Foremost." *Life*: 88–91.

"Hate Speech on Campus." American Civil Liberties Union (ACLU) Briefing Paper No. 16. New York, 1993.

Hess, Diana. *Punishing Hate–Protecting Expression: Democracy's Dilemma*. Supplementary text for grades 9–12. Chicago: Constitutional Rights Foundation Chicago, 1994.

Murphy, Paul L. *World War I and the Origin of Civil Liberties in the United States*. New York: W. W. Norton, 1979.

TWO ACCUSED: CHRONICLE OF A RAPE TRIAL

Andrias, Richard T. "Rape Myths: A Persistent Problem in Defining and Prosecuting Rape." *Criminal Justice* (American Bar Association Section of Criminal Justice) 7, no. 2 (Summer 1992).

"Naming Names: Should the Victims of Rape Be Identified?" *Newsweek*, 29 April 1991.

Raphael, Alan. "Rape Victims' Privacy Rights vs. Freedom of the Press: *The Florida Star v. B.J.F.*" *Preview of United States Supreme Court Cases* (American Bar Association Division for Public Education), no. 11 (1988–89 Term): 315–16.

EQUALITY AND THE INDIVIDUAL

"Affirmative Action." American Civil Liberties Union (ACLU) Briefing Paper No. 17, New York, 1993.

Jackson, Donald W. *Even the Children of Strangers: Equality Under the U.S. Constitution*. Lawrence, Kans.: University Press of Kansas, 1992.

Katz, Stanley N. "Constitutional Equality." *This Constitution: A Bicentennial Chronicle* (Project '87 of the American Historical Association and American Political Science Association) (Spring/Summer 1988): 31–35.

Rosenfeld, Michel. *Affirmative Action & Justice: A Philosophical & Constitutional Inquiry*. New Haven, Conn.: Yale University Press, 1991.

CRIMINAL JUSTICE: FROM MURDER TO EXECUTION

Carr, James. *Criminal Procedure Handbook*. Deerfield, Ill.: Clark Boardman Callaghan, 1994. (Updated annually)

Dash, Samuel. "Can the Bill of Rights Survive the Crisis in Criminal Justice?" *Update on Law-Related Education* (American Bar Association Special Committee on Youth Education for Citizenship) 14, no. 1 (Winter 1990): 7–10.

Hall, John C. "The Constitution and Criminal Procedure." *This Constitution: A Bicentennial Chronicle* (Project '87 of the American Historical Association and American Political Science Association) (Spring/Summer 1988): 53–57.

Robbins, Ira. *Habeas Corpus Checklists*. Deerfield, Ill.: Clark Boardman Callaghan, 1994. (Updated annually)

ADDITIONAL RESOURCES

"Abortion: *Planned Parenthood of Southeastern Pennsylvania v. Casey*" *Update on the Courts* (American Bar Association Special Committee on Youth Education for Citizenship) 1, no. 1 (Fall 1992): 14–17.

"Employment Law: *Teresa Harris v. Forklift Systems, Inc.*" *Update on the Courts* 2, no. 2 (Winter 1994): 10–11.

"First Amendment: *R.A.V. v. St. Paul*." *Update on the Courts* 1, no. 1 (Fall 1992): 9–11.

"Jury Selection: *J.E.B. v. T.B.*" *Update on the Courts* 2, no. 2 (Winter 1994): 6–9.

Lieberman, Jethro K. *The Enduring Constitution: A Bicentennial Perspective*. St. Paul, Minn.: West Publishing Company, 1987.

Patrick, John J. *The Young Oxford Companion to the Supreme Court of the United States*. New York: Oxford University Press, 1994.

Patrick, John J., and Robert S. Leming. *Resources for Teachers on the Bill of Rights*. Bloomington, Ind.: ERIC Clearinghouse for Social Studies/Social Science Education, 1991.

The Research Companion: Supreme Court Decisions. Garden City, N.Y.: Focus Media, 1987. Computer software.

Schimmel, David M., and Lewis Fischer. *Freedom, Fairness, and Equality*. Washington, D.C.: Phi Alpha Delta Public Service Center, 1994.

Stone, Geoffrey P., Richard A. Epstein, and Cass R. Sunstein, eds. *The Bill of Rights in the Modern State*. Chicago: University of Chicago Press, 1992.

Update on Law-Related Education (American Bar Association Special Committee on Youth Education for Citizenship) 15, no. 1 (Winter 1991). (Special Law Day Issue on the Bill of Rights)

Update 15, no. 3 (Fall 1991). (Subtitled "Extending the Bill of Rights: The Civil War Amendments")

KEY ORGANIZATIONS

Among the many organizations with Bill of Rights education programs and resources are the following:

American Bar Association
Special Committee on Youth Education for Citizenship (ABA/YEFC)
541 N. Fairbanks Court
Chicago, IL 60611-3314
312/988-5735
Can provide nationwide information on Bill of Rights and law-related education (LRE) programs, materials, and contact persons.

American Historical Association (AHA)
400 A Street, SE
Washington, DC 20003
202/544-2422

American Political Science Association (APSA)
Division of Education
1527 New Hampshire Avenue, NW
Washington, DC 20036
202/483-2512

The AHA and APSA codirected the Bill of Rights Education Collaborative.

Center for Civic Education
5146 Douglas Fir Road
Calabasas, CA 91302
818/591-9320
Coordinates the national competition on the Constitution and Bill of Rights called "We the People . . . The Citizen and the Constitution."

ERIC Clearinghouse for Social Studies/ Social Science Education (ERIC/ChESS)
2805 E. Tenth Street, Suite 120
Bloomington, IN 47408
812/855-3838
The ERIC/ChESS clearinghouse has information on Bill of Rights educational resources for social studies educators.

National Archives
Education Branch (NEEE)
Washington, DC 20408
202/501-6172
Produces educational materials on Bill of Rights and can direct educators to regional archives.

FURTHER INFORMATION

For further information on Bill of Rights education programs and resources, contact:
American Bar Association
National Law-Related Education Resource Center
Special Committee on Youth Education for Citizenship (ABA/YEFC)
541 N. Fairbanks Court
Chicago, IL 60611-3314
312/988-5735

That Delicate Balance II: Our Bill of Rights

Refer to seating charts in this guide for participants in each program.

Key
Program 1 = *Life and Choice After* Roe v. Wade
Program 2 = *The First Amendment and Hate Speech*
Program 3 = *Two Accused: Chronicle of a Rape Trial*
Program 4 = *Equality and the Individual*
Program 5 = *Criminal Justice: From Murder to Execution*

Series Participants

Name	*Title (at time of filming)*	*Program*
Floyd Abrams	Attorney, New York	2,3
Burke Balch	State Legislative Director, National Right to Life Committee	1
Janet Benshoof	Director, ACLU Reproductive Freedom Project	1
Kevin Berrill	Director, Campus & Anti-Violence Projects, National Gay & Lesbian Task Force	2
James Bopp, Jr.	Counsel, National Right to Life Committee	1
Robert Bork	Scholar, American Enterprise Institute; former Judge, U.S. Court of Appeals	1,2,5
Lee Brown	Commissioner, New York City Police	2
Joan Byers	Special Deputy Attorney General, North Carolina	5
Stephen Carter	Professor, Yale Law School	1,4
Jesse Choper	Dean, University of California at Berkeley (Boalt) School of Law	4
David Corwin	Director, Center for Child and Family Development, Washington University	5
Michael Donovan	Investigator, Monmouth County Prosecutor's Office	5
Linda Fairstein	Chief, Sex Crimes Prosecution Unit New York District Attorney's Office	3
John R. Ford	Trial Attorney, Court TV Anchor (Moderator)	5
Barney Frank	U.S. Representative, Massachusetts	1,4
Mary Ellen Gale	Professor, Whittier College Law School	2
Eric Garcetti	Student, Columbia University	2
Willard Gaylin	President, The Hastings Center	1,3,4
Stephen Gillers	Professor, New York University Law School	1,3,4
Reuben Greenberg	Chief of Police, Charleston, South Carolina	5
Michael Greve	Executive, Director, Center for Individual Rights	4
Nat Hentoff	Journalist, *Village Voice*	1,2
Henry Holzer	Professor, Brooklyn Law School	4
Henry Hyde	U.S. Representative, Illinois	1,2
Kirtly Parker Jones	Chief, Reproductive Endrocrinology, University of Utah Medical Center	1
Nathaniel R. Jones	Judge, U.S. Court of Appeals	2,4
Ruth Jones	Staff Attorney, National Organization for Women Legal Defense and Education Fund	4
John Keenan	Judge, U.S. District Court	3
Randall Kennedy	Professor, Harvard Law School	2,4
Steve Kroft	Correspondent, *60 Minutes*	3
Madeleine Kunin	former Governor, State of Vermont	1
Anthony Lewis	Columnist, *The New York Times*	1,2,5
Jack Litman	Attorney, New York	3,5
Goodwin Liu	Rhodes Scholar, Oxford University	4
Elizabeth Loftus	Professor of Psychology, University of Washington	5
Carlton Long	Assistant Professor of Political Science, Columbia University	4
E. Michael McCann	District Attorney, Milwaukee County	1
Arthur Miller	Professor, Harvard Law School (Moderator)	2
Jerry Nachman	Editor, *The New York Post*	3,5
James Neal	Attorney	3,5
Charles R. Nesson	Professor, Harvard Law School (Moderator)	1
Irene Nolan	Managing Editor, *The Courier-Journal*, Louisville	3
Charles Ogletree, Jr.	Professor, Harvard Law School (Moderator)	4
Carrie Saxon Perry	Mayor, Hartford, Connecticut	1,2
Anna Quindlen	Columnist, *The New York Times*	1,3,4
H. Lee Sarokin	Judge, U.S. District Court	5
Antonin Scalia	Justice, U.S. Supreme Court	2,3,4,5
John Scanlon	Partner, Sawyer Miller Group	3
Benno Schmidt	President, Yale University	2
William Sheppard	Partner, Sheppard and White, P.A.	5
Leah Simms	Assistant U.S. Attorney, Southern District of Florida	3,5
Leslie Crocker Snyder	Justice, New York State Supreme Court	3,5
Kenneth Starr	U.S. Solicitor General	1,2
Nadine Strossen	President, ACLU	2
Brendan Sullivan, Jr.	Attorney, New York	3
Kathleen Sullivan	Professor, Harvard Law School (Moderator)	3
Gerald Torres	Associate Dean, University of Minnesota Law School	2
Paul Verkuil	President, College of William and Mary	4
David Waksman	Assistant State's Attorney, Dade County, Florida	5
Clifford Watson	Principal, Malcolm X Academy, Detroit, Michigan	4

That Delicate Balance II: Our Bill of Rights

Key Constitutional Protections and Concepts

	Program				
	1	2	3	4	5
First Amendment					
Freedom of assembly		★	★		
Freedom of expression		★	★		
Freedom of speech	★	★	★		
Freedom of the press		★	★		
Fourth Amendment					
Search and seizure					★
Fifth Amendment					
Protection against self-incrimination					★
Due process of law					★
Sixth Amendment					
Right to confront accusers			★		★
Right to a speedy and public trial			★		
Eighth Amendment					
Cruel and unusual punishments					★
Fourteenth Amendment					
Due process of law	★				★
Equal protection				★	★
Affirmative action				★	
Federalism	★				
Right of privacy	★		★		
Right to travel	★				
Symbolic speech		★			
Women's rights	★		★		

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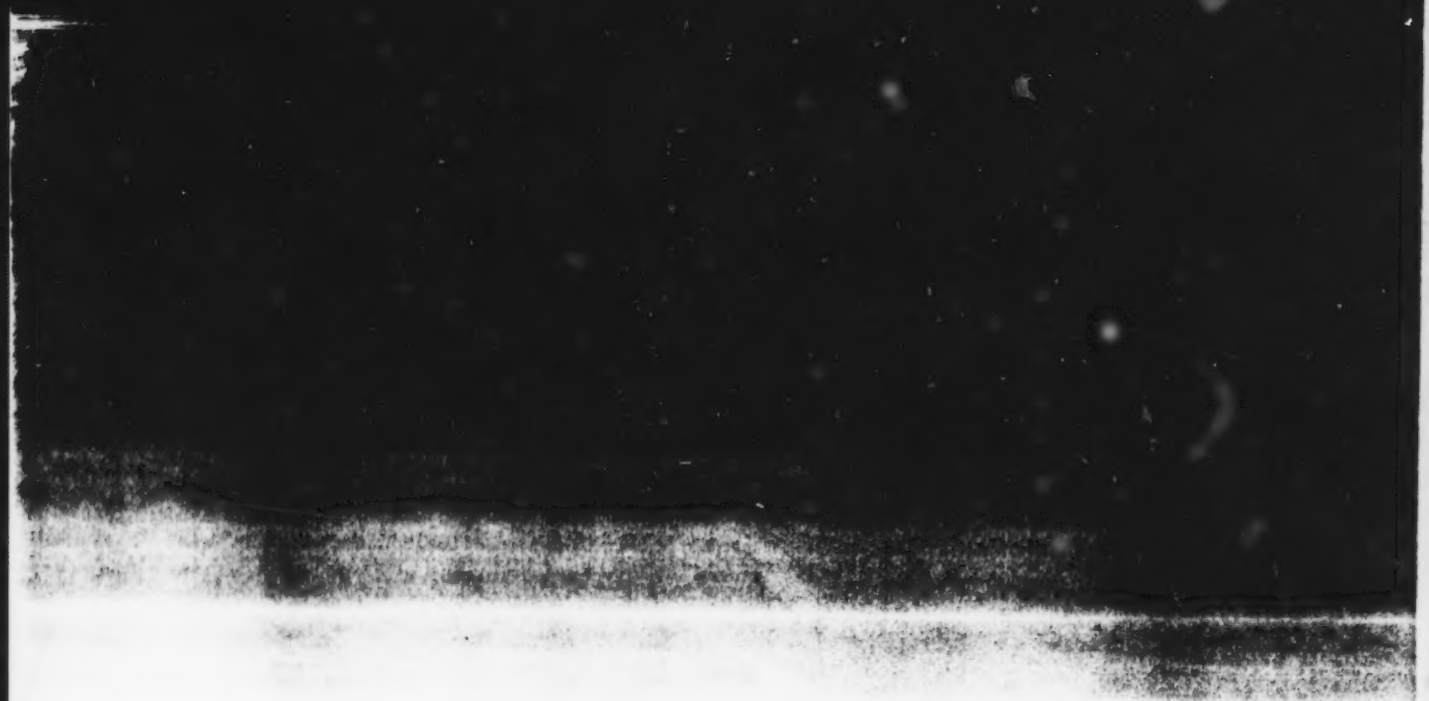

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